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Florida Mediation Case Law: Two Decades of Maturation

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FLORIDA MEDIATION CASE LAW: TWO DECADES OF MATURATION

FRAN L. TETUNIC*

I.	INTRODUCTION AND BACKGROUND	88
II.	CONFIDENTIALITY.....	91
A.	<i>Protection of Confidentiality</i>	91
B.	<i>Enforcement of Confidentiality</i>	97
C.	<i>Rules of Procedure Impact Confidentiality</i>	101
D.	<i>Waiver of Privilege of Confidentiality</i>	103
III.	APPEARANCE AT MEDIATION	105
A.	<i>Obligation to Attend Mediation</i>	105
B.	<i>Authority to Settle at Mediation</i>	109
IV.	COURTS SEEK TO UPHOLD MEDIATION AGREEMENTS.....	111
A.	<i>Mediation Environment</i>	111
B.	<i>Intent to be Bound by the Mediation Agreement</i>	112
C.	<i>Finality of Mediation Agreements</i>	113
D.	<i>Enforcement of Mediation Agreements</i>	116
E.	<i>Interpretation of Mediation Agreements</i>	119
F.	<i>Parties Decide Mediation Agreement Coverage and Terms</i>	123
V.	COURTS OVERTURN MEDIATION AGREEMENTS AS REQUIRED BY LAW	124
A.	<i>Mediator Misconduct</i>	124
B.	<i>Extortion, Fraud, and Misrepresentation</i>	125
C.	<i>Mediation Agreements May Not Violate the Law</i>	126
D.	<i>Mutual Mistake and Lack of Consideration</i>	128

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VI.	PROCEDURAL AND RELATED MATTERS.....	132
A.	<i>Access to the Courts</i>	132
B.	<i>Use of and Access to Alternative Dispute Resolution</i>	135
C.	<i>Obligations of Judges, Attorneys, and Paralegals</i>	137
VII.	CONCLUSION	142

I. INTRODUCTION AND BACKGROUND

Charles Dickens wrote that being involved in a suit in England's Court of Chancery was like: "being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains."¹ One hundred and fifty years later, lawsuits still evoke similar feelings in litigants. However, as one association of attorneys has pointed out, Dickens' warning still fails to keep them away from the courts:

Hundreds and hundreds of people are exposed to such torture each year, some of them actually choosing to initiate the process. They invariably find the experience painful, protracted, and expensive. Yet there remains a queue of victims impatient for their turn²

Yet an ever-increasing throng has discovered the pursuit of justice need not involve protracted pain. Presently in Florida, parties and attorneys routinely mediate their legal disputes, highlighting Florida's national recognition as a leader in the field of mediation.³

"Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties

1. CHARLES DICKENS, *BLEAK HOUSE* 53 (Oxford University Press 1987) (1853). Earlier in the novel, Dickens suggests that the following motto hang over the doors of the Court of Chancery: "'Suffer any wrong that can be done you, rather than come here!'" *Id.* at 3.

2. Collaborative Law Alliance of New Hampshire, *available at* <http://www.collaborativelawnh.org> (wrongly attributed the quotation to Dickens' *Bleak House*) (last visited Feb. 2, 2003).

3. Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, FLA. B. J., Oct. 1996, at 44.

in identifying issues, fostering joint problemsolving, and exploring settlement alternatives.⁴

With over two decades of court-connected mediation, Florida courts have developed an extensive body of case law.⁵ This article seeks to memorialize mediation's coming of age by collecting, discussing, and analyzing the significant cases that comprise Florida's mediation common law, dividing cases into five subject areas: confidentiality, appearance at mediation, mediation agreements upheld by courts, mediation agreements overturned by courts, and procedural and related matters. To avoid duplication, with few exceptions, cases appear in only one subject area, although many appropriately fit within two or more. Discussion of the over fifty Florida statutes that mention mediation, as well as the applicable rules of procedure, lies beyond the scope of this article. They will, of course, be noted when necessary to understand or distinguish a case or concept, as will specific *Florida Rules for Certified and Court-Appointed Mediators*.

Mediation is a household word. One need only read the newspaper, listen to the news on radio or television, or surf the net to learn that distinguished statesmen are mediating in the Middle East, owners and players of professional sports teams are mediating to divert a strike, or union members and employers are mediating a new employment contract. If individuals have not been directly involved with mediation, they probably know someone who has. The breadth of mediated matters ranges from a peer mediation at school to mediation of a murder case following mistrial.⁶

Mediation is not new. "Use of mediation, similar to that which we see today, can be traced back several hundreds, even thousands of years."⁷

4. FLA. STAT. § 44.1011(2) (2002).

5. Florida's experience typifies that of the rest of the country. "In this new era, mediation is becoming more institutionalized, regularized and uniform. Or, expressed in different terms, mediation is now reflecting the interests and values of the legal order. During the past two decades we have witnessed an explosion of interest in mediation among judges and lawyers." James J. Alfani, *Mediation's Coming of (Legal) Age*, 22 N. ILL. U. L. REV. 153, 153 (2002).

6. Despite the doubts of some commentators, Escambia County Judge Frank Bell sent the case of Derek and Alex King, two brothers convicted of killing their father, to mediation. Following trial, the judge threw out the murder convictions, and sent the case to mediation for determination of appropriate sentences. The matter was fully resolved in mediation. *State v. King*, Escambia County Circuit Court Case No. 2001 CF 005612 available at http://205.152.130.14/cv_web_1b.asp?ucase_id=31993884; ABA Journal eReport, Friday, Oct. 25, 2002.

7. KIMBERLEE A. KOVACH, *MEDIATION PRINCIPLES & PRACTICE* 25 n.16 (2d ed. 2000). "Use of mediation has been documented in ancient China over two thousand years ago. See,

"Florida entered the ADR [Alternative Dispute Resolution] movement in the mid-1970s with the establishment of 'citizen dispute settlement' (CDS) centers and pilot divorce mediation programs"⁸

In 1987, after Florida had experienced its great success with the early CDS and divorce mediation programs, the Florida Legislature adopted one of the nation's most comprehensive court-connected (read: [I]nstitutionalized) mediation and arbitration statutes. Trial judges were given the broad discretion to order any civil case to mediation or arbitration subject to Florida Supreme Court rule.⁹

In 2001, over 100,000 cases were referred to court-connected mediation programs.¹⁰ Numerous other cases were privately mediated by the parties before, during, or subsequent to suit. For many cases, mediation obviated the need for court intervention. At the present time, all twenty judicial circuits refer a portion of their caseload to mediation.¹¹ In addition, state appellate as well as federal cases are being mediated.

Over 5000 individuals have been certified as mediators by the Supreme Court of Florida, and approximately 14,000 have completed Supreme Court of Florida certified mediation training programs.¹² Displaying commitment to excellence in Alternative Dispute Resolution, the Supreme Court of Florida has created three standing ADR committees: the Supreme Court Committee on ADR Rules, the Supreme Court Committee on ADR Policy, and the Mediator Ethics Advisory Committee. It has also created two grievance boards: the Mediation Training Review Board and the Mediator Qualifications Board. Additionally, Florida's Dispute Resolution Center offers an ADR Innovative Grant Program allowing courts to apply for seed money to create innovative dispute resolution projects.¹³ To foster confidence in the mediation process, and encourage mediators to keep abreast of ethical responsibilities and new developments in the law, Florida requires certified mediators to comply with the *Florida Rules for Certified and Court-*

for example, Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 55 CAL. L. REV. 1201, 1205 (1996)."

8. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 905 (1997).

9. *Id.* at 907.

10. FLORIDA MEDIATION ARBITRATION PROGRAMS: A COMPENDIUM viii (Kimberly Ann Kosch & Sharon Press eds., 15th ed. 2002).

11. *Id.*

12. *Id.* at ix.

13. *Id.* at vii.

Appointed Mediators and to complete sixteen hours of continuing mediator education every two years.

Mediation has a long rich history, setting it apart from other ADR processes. Unique in its peacekeeping mission, mediation employs a neutral third party who does not render a decision for the parties.¹⁴ Rather, it stresses self-determination of the parties, respecting their ability to make decisions.¹⁵ “Mediation is not presented here as a panacea for the existing ills of our judicial institutions, but rather as a dynamic process that must be understood before being applied and one that can be particularly helpful in a number of different kinds of disputes, including family conflicts and divorces.”¹⁶ The body of case law discussed in this article reflects the extent to which mediation has become an accepted and expected part of our legal system.

II. CONFIDENTIALITY

A. *Protection of Confidentiality*

“One of the fundamental axioms of mediation is the importance of confidentiality. It is deemed necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process.”¹⁷ Confidentiality is the foundation on which mediation rests, allowing parties to build trust, share information, problem solve, and decide whether to reach resolution. “The assurance of confidentiality is essential to the integrity and success of the Court’s mediation program, in that confidentiality encourages candor between the parties and on the part of the mediator, and confidentiality serves to protect the mediation program from being used as a discovery tool for creative attorneys.”¹⁸ “Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached.”¹⁹

14. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.210.

15. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.230. Mediation emphasizes self-determination, the needs and interests of the parties, fairness, procedural flexibility, confidentiality, and full disclosure. *Id.*

16. *Esdale v. Esdale*, 487 So. 2d 1219, 1221 (Fla. 4th Dist. Ct. App. 1986) (citing Margaret S. Herrman, Book Review, 19 FAM. L.Q. 465 (1986) (reviewing Jay Folberg & Alison Taylor, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984), 19 FAM. L.Q. 465 (1986)).

17. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U. C. DAVIS L. REV. 33, 35 (2001).

18. *In re Anonymous*, 283 F.3d 627, 636 (4th Cir. 2002) (citing *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979)).

19. *D.R. Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

Mediation confidentiality may be bolstered by statutory privileges, rules of evidence, rules of procedure, ethical rules, and contract law. "Although mediators usually tell the parties that the proceedings are confidential, the mediators [sic] promise does not create an evidentiary privilege or other protection that will be judicially recognized."²⁰ In Florida, mediation confidentiality is granted by statutory privilege.²¹ The privilege is held by the parties, but may be asserted by the mediator on their behalf. "Each party in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceeding."²² Similarly, statutory privileges also protect family,²³ mobile home,²⁴ and citizen dispute settlement center mediation communications.²⁵

20. Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 92 (1999).

21. In *State v. Castellano*, 460 So. 2d 480, 481 (Fla. 2d Dist. Ct. App. 1984), the court found no authority for the mediator's statement that the parties' communications during mediation were confidential and identified the legislature as the "proper branch of government from which to obtain the necessary protection." *Id.* at 482. "[P]rivileges in Florida are no longer creatures of judicial decision." *Id.* at 481 (citing *Marshall v. Anderson*, 459 So. 2d 384 (Fla. 3d Dist. Ct. App. 1984)). Subsequently, in 1987 the legislature enacted a confidentiality privilege for court ordered mediation. Ch. 172, 1987 Fla. Laws (enacting FLA. STAT. § 44.302(2) (1987)). In 1990 Ch. 188, 1990 Fla. Laws amended and renumbered this statute as FLA. STAT. § 44.102(3). Prior to creating a privilege for court-ordered mediation, the legislature enacted a confidentiality privilege for family mediation (Ch. 96, 1982 Fla. Laws creating FLA. STAT. § 61.21(3), renumbered § 749.01(3) (1982)), a confidentiality privilege for Citizen Dispute Settlement Center mediation (Ch. 228, 1985 Fla. Laws creating FLA. STAT. § 44.201(5) (1985)), and a confidentiality privilege for mobile home mediation (Ch. 198, 1990 Fla. Laws adding FLA. STAT. § 723.038(9) (1990)). The confidentiality privilege for family mediation was renumbered § 44.101(3) in 1985. Since 1986 the confidentiality privilege for family mediation has been codified at FLA. STAT. § 61.183(3). (Ch. 220, 1986 Fla. Laws).

22. FLA. STAT. § 44.102(3) (2002). This statutory section further provides that "all oral or written communications in mediation proceedings, other than the executed settlement agreement, are exempt from the requirements of [Florida Statutes] chapter 119, and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise." *Id.*

23. FLA. STAT. § 61.183(3) (2002).

Each party to a mediation proceeding has a privilege during and after the proceeding to refuse to disclose and to prevent another from disclosing communications made during the proceeding, whether or not the contested issues are successfully resolved. This subsection shall not be construed to prevent or inhibit the discovery or admissibility of any information that is otherwise subject to discovery or that is admissible under applicable law or rules of court, except that any conduct or statements made during a mediation proceeding or in negotiations concerning the proceeding are inadmissible in any judicial proceeding.

Id.

24. FLA. STAT. § 723.038(8) (2002). "Each party involved in the mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from

Mediators governed by *Florida Rules for Certified and Court-Appointed Mediators* have a duty to protect the confidentiality of the mediation process.²⁶ “A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law.”²⁷ During the orientation session, the mediator must inform the mediation participants that “communications made during the process are confidential, except where disclosure is required by law.”²⁸ Additionally, “[i]nformation obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party.”²⁹ Mediators must also maintain confidentiality regarding mediation records, and while participating in training and research activities may not disclose identifying information.³⁰

Attorneys and parties may mistakenly assume that all mediation communications are confidential. However, only some mediators are required to comply with the *Florida Rules for Certified and Court-Appointed Media-*

disclosing, communications made during such proceeding, whether or not the dispute was successfully resolved.” *Id.* This statutory section further provides:

[T]here is no privilege as to communications made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or a fraud. Nothing in this subsection *shall be* construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

Id. The last sentence is the original language from the privilege for court-ordered mediation enacted in 1987. Ch. 172, 1987 Fla. Laws. In 1990 this language was deleted from the privilege for court-ordered mediation. Ch. 1988, 1990 Fla. Laws.

25. FLA. STAT. § 44.201(5) (2002).

Any information relating to a dispute obtained by any person while performing any duties for the center from the files, reports, case summaries, mediator's notes, or other communications or materials, oral or written, is confidential and exempt from the provisions of section 119.07(1) and shall not be publicly disclosed without the written consent of all parties to the dispute. Any research or evaluation effort directed at assessing program activities or performance shall protect the confidentiality of such information. Each party to a Citizen Dispute Settlement Center proceeding has a privilege during and after those proceedings to refuse to disclose and to prevent another from disclosing communications made during such proceedings, whether or not the dispute was successfully resolved.

Id.

26. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360. The ethical rules provide standards of conduct for certified and court-appointed mediators. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200. For other mediators, the rules are merely advisory. Accordingly, only mediators governed by the ethical rules are subject to disciplinary proceedings pursuant to the rules. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.700.

27. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

28. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.420(a)(3).

29. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(b). Caucus refers to private meetings between the mediator and one or some of the mediation participants. *Id.*

30. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(c).

tors,³¹ and only some mediated matters are covered by statutory privileges.³² Additionally, Florida's evidentiary exclusion is more limited than the mediation statutory privileges, as it only limits admissibility of settlement negotiations at trial.³³ Consequently, in an attempt to safeguard the confidentiality of mediation communications, attorneys, mediators, and parties are entering into carefully crafted confidentiality agreements prior to mediation to provide contractual protection and clarity.³⁴

Florida Statutes provide inconsistent direction regarding a mediator's role in protecting the confidentiality of the mediation process. The statutory privilege for court-ordered mediation provides that each party to a mediation has a privilege to refuse to disclose and prevent anyone present at the mediation session from disclosing communications made during the mediation proceeding.³⁵ Yet, Florida statutory law requires mandatory reporting of child abuse and neglect, as well as abuse and neglect of the elderly and individuals with disabilities.³⁶ These matters, the statutes direct, must be re-

31. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a). Only certified mediators and court-appointed mediators are obligated to comply with these rules.

32. See FLA. STAT. § 44.102(3), § 61.183(3), § 723.038(8), § 44.201(5) (2002).

33. FLA. STAT. § 90.408 (2002). See Ehrhardt, *supra* note 20, at 102, for analysis of the protection provided to mediation proceedings by rule 408 of the *Federal Rules of Evidence*.

34. "[I]t is up to the parties during non-court-ordered mediation to provide by agreement confidentiality of the mediation. Absent that agreement there currently is no statute, constitutional provision/interpretation, or rule that extends confidentiality to non-court-ordered mediation." State v. Trull, 9 Fla. L. Weekly Supp. D289, D290 (7th Cir. Apr. 30, 2002). Statutory confidentiality privileges do apply to court-ordered, family, mobile home, and citizen dispute settlement center mediations. See *supra* notes 22–25.

35. FLA. STAT. § 44.102(3) (2002). The first Florida statute granting a privilege for court-ordered mediation provided in relevant part:

There is no privilege as to communications made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or a fraud. Nothing in this subsection shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

FLA. STAT. § 44.302(2) (1987). This language was deleted in 1990. Ch. 188, 1990 Fla. Laws (amending FLA. STAT. § 44.302(2) (1987)). In 1992, a proposed amendment providing for exceptions to the mediation privilege was not adopted. It read:

There shall be no privilege and no restriction on disclosure in relation to communications which give the mediator knowledge of, or reasonable cause to suspect, that a child has been abused or neglected. There is no privilege and no restriction on disclosure as to communications made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud. Nothing in subsection (3) shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

H.B. 183 (1992).

36. FLA. STAT. § 39.201 (2002); FLA. STAT. § 415.1034 (2002). Additionally, Florida law prohibits the concealment of public hazards. The applicable statute does not require mandatory reporting, but does provide:

Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful

ported by anyone who knows or has reasonable cause to suspect the prohibited conduct.³⁷ What then is the mediator's obligation if she learns of child abuse during the mediation? Many court certified mediators construe the statutes in conjunction with their ethical obligation to keep everything confidential except where disclosure is required by law,³⁸ and read the statutes as requiring confidentiality with the exception of their legal obligation to report abuse and neglect.³⁹ However, not all who mediate in Florida are bound by Florida's ethical rules for mediators, and some mediators may not believe they are required by law to report abuse and neglect.

Canons of statutory construction, presumptions that vary in strength according to the importance of the policy behind them,⁴⁰ are helpful in construing these apparently conflicting statutes. However, as many disagree on when these canons apply as well as their relative weight, they will not provide a definitive answer to our question. They will, regardless, assist in formulating plausible ways to construe the statutes and offer a basis for reasoned interpretation. Speaking off the record, one mediator acknowledges that one judge in the state believes the later statute (mediation privilege) controls the earlier statutes (reporting abuse and neglect), and the statute specific to mediators controls the general mandatory reporting statutes. While a canon does provide that a newer statute controls because it has the effect of repealing the earlier one, it only has that effect to the extent of the inconsistency.⁴¹ This canon applies when it is impossible to interpret two statutes harmoniously. If one reads the mediation confidentiality statute as requiring that everything except the written agreement is confidential, one might choose to employ this canon to reach the conclusion that mediators need not report abuse and neglect. If however, one believes the statutes may be interpreted harmoniously (the mediators keep confidentiality with the limited exceptions required by the other statutes), the canon is not appropriately applied.

Another canon provides that the specific provision controls the general one.⁴² Many mediators employ this canon to determine that they have an

to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

FLA. STAT. § 69.081(4) (2002).

37. FLA. STAT. § 39.201 (2002); FLA. STAT. § 415.1034 (2002).

38. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

39. FLA. STAT. § 39.201 (2002); FLA. STAT. § 415.1034 (2002).

40. *See generally*, RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT (NITA 2002).

41. *Id.* at 96 (citing *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1234 (Fla. 2000)).

42. BROWN & BROWN, *supra* note 40, at 90.

obligation to report abuse and neglect which the legislature specifically earmarked for mandatory reporting. This interpretation is consistent with the mediator's ethical obligation to maintain confidentiality except where required by law, and the approach to read *in pari materia* new statutes that concern the same subject matter.⁴³ "*In pari materia*, 'part of the same material,' provides that new legislation be interpreted to make it consistent with existing statutes that concern the same subject matter."⁴⁴ Mediators generally prefer interpreting the statutes as coexisting harmoniously, requiring them to honor confidentiality, yet report child and vulnerable adult abuse and neglect.

Nonetheless, neither statutory construction nor case law adequately advises a mediator as to the breadth of and possible exceptions to mediation confidentiality privileges. One case does highlight the tension between the public policy to communicate child abuse and the public policy to honor confidentiality.⁴⁵ In *C.R. v. E.*, the parties agreed to resolve their differences through the mediation/arbitration forum offered by the Christian Conciliation Service of Central Florida, Inc. ("CCS").⁴⁶ The matter to be resolved was the parents' allegation that a Catholic priest had fondled their minor daughter.⁴⁷ CCS rules included one entitled "Confidentiality" which read: "All statements made during the conciliation process will be of a confidential nature and will not be made known to persons not involved in the process."⁴⁸ The CCS arbitrators reached a decision, finding that "the priest had touched the daughter in an inappropriate manner on several occasions and that the Church was negligent in retaining and supervising him."⁴⁹ The arbitration panel found against the priest and the Church jointly and severally in the amount of \$250,000.⁵⁰ Subsequent to payment of the full amount by the local Diocese to the parents, counsel for the parents informed church counsel that they considered any confidentiality agreement null and void.⁵¹ The court of appeal disagreed, affirming per curiam the trial court's refusal to dissolve a temporary injunction enjoining the parents from communicating with third parties regarding the proceeding.⁵² The strong well-reasoned dissent maintained the requirement of confidentiality was void as a matter of public pol-

43. *Id.* at 45.

44. *Id.*

45. *See C.R. v. E.*, 573 So. 2d 1088 (Fla. 5th Dist. Ct. App. 1991).

46. *Id.* (Cobb, J., dissenting).

47. *Id.*

48. *Id.*

49. *Id.* at 1089.

50. *C.R.*, 573 So. 2d at 1089 (Cobb, J., dissenting).

51. *Id.*

52. *Id.* at 1088.

icy,⁵³ and moreover, a person who takes money on an agreement to conceal a felony is guilty of a third degree felony.⁵⁴

Florida mediators, attorneys, and parties need clear guidance as to what is not confidential during mediation. The statutory confidentiality privileges apply to only some of the many mediated cases. The mediation privilege for court-ordered cases leaves doubt as to the mediator's obligation to report matters that may be deemed "required by law," and does not clarify what, if anything, is required by law. Additionally, mediators who are not certified or court-appointed do not have the ethical obligation to keep mediation communications confidential unless required by law. Given the many variables, confidentiality will vary greatly based on whether a privilege applies, the court ordered mediation, the mediator is certified, and the parties entered into a confidentiality agreement. The legislature would do well to clarify the confidentiality privilege with careful attention to the experiences and concerns of the mediators, attorneys, judges, and parties. In *State v. Trull*, a circuit court respectfully suggested "the Legislature review the wisdom of extending confidentiality to non court-ordered mediation conducted by certified mediators who are subject to the Florida Rules for Certified and Court-Appointed Mediators."⁵⁵

B. Enforcement of Confidentiality

Florida judges have recognized the importance of confidentiality to mediation and have enforced mediation confidentiality agreements and privileges. Judges may also severely sanction mediation participants who do not abide by confidentiality agreements. In *Paranzino v. Barnett Bank*, the trial court dismissed plaintiff's case with prejudice finding that plaintiff and her attorney deliberately and willfully breached the confidentiality provision in their Mediation Report and Agreement.⁵⁶ After attending court-ordered me-

53. *Id.* The public policy cited by dissent provides "any person . . . who knows, or has reasonable cause to suspect, that a child is . . . abused . . . shall report such knowledge or suspicion to the (Department of Health and Rehabilitative Services) . . ." *C.R.*, 573 So. 2d at 1089 (citing FLA. STAT. § 415.504 (1989)).

54. *Id.* (citing FLA. STAT. § 843.14(4) (1989)).

55. 9 Fla. L. Weekly Supp. D289 (7th Cir. Apr. 30, 2002).

56. 690 So. 2d 725, 726 (Fla. 4th Dist. Ct. App. 1997). The parties and their counsel, signers of the report and agreement, agreed to be bound by confidentiality agreements and not to disclose any discussions unless agreed to in writing by the parties or ordered by the court. *Id.* Further, they agreed that the mediation was covered by the provisions of Chapter 44 of the *Florida Statutes* and rule 1.700 *et seq.* of the *Florida Rules of Civil Procedure*. *Id.* at 728. Section 44.102(3) of the *Florida Statutes* provided that communications in a court-ordered

diation at which the parties did not settle, Victoria Paranzino and her attorney disclosed to a Miami Herald reporter the settlement offer made by Barnett Bank during their mediation conference.⁵⁷ The resulting article which appeared in the Miami Herald's Tropic Magazine recounted Paranzino's version of the facts of her case and statements, attributed to her attorney, discussing the settlement offer.⁵⁸ The appellate court affirmed the imposition of the harshest sanction of dismissing the case with prejudice, finding that appellant Paranzino and her attorney deliberately violated the court order setting the matter for mediation, breached the confidentiality provision in the Mediation Report and Agreement, and disregarded the governing statute and rule of procedure by disclosing the settlement offer to the Miami Herald.⁵⁹ The trial court based its ruling on strong public policy honoring mediation confidentiality.⁶⁰ "If the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process."⁶¹

"The confidentiality of the mediation negotiations should remain inviolate until a written agreement is executed by the parties."⁶² Each party to a court-ordered mediation has a privilege to prevent disclosure of the communications made during the mediation proceeding.⁶³ Other than an executed settlement agreement, all oral and written communications are confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties otherwise agree.⁶⁴ Courts will neither recognize oral mediation agreements nor hear testimony alleging their existence.⁶⁵ In *Hudson*, the wife and her attorney appeared at the final hearing for dissolution of marriage alleging an oral mediated agreement and presenting an unsigned version of the alleged agreement, with the mediator's signature on the back.⁶⁶ Although the mediation agreement was never reduced to writing, and neither the husband nor his attorney appeared at the final hearing, the trial court en-

mediation proceeding be confidential and inadmissible in subsequent legal proceedings. The court ordered the parties to mediate at appellant's request. *Id.* at 726.

57. *Paranzino*, 690 So. 2d at 726.

58. *Id.*

59. *Id.* at 729-30.

60. *Id.* at 728.

61. *Id.* at 729; see also *Floyd v. St. Johns County Fla.*, 5 Fla. L. Weekly Supp. 440 (7th Cir. Feb. 24, 1998).

62. *Hudson v. Hudson*, 600 So. 2d 7, 9 (Fla. 4th Dist. Ct. App. 1992); *Cohen v. Cohen*, 609 So. 2d 785, 786 (Fla. 4th Dist. Ct. App. 1992) (quoting *Hudson*, 600 So. 2d at 9).

63. *Hudson*, 600 So. 2d at 8 (citing FLA. STAT. § 44.102(3) (Supp. 1990)).

64. *Id.*

65. *Id.* at 9.

66. *Id.* at 8.

tered a judgment and later denied the husband's motion to vacate.⁶⁷ The appellate court found that the admission of the "agreement" poisoned the well, necessitating that the judgment be vacated and the matter be tried anew.⁶⁸

Disclosure of confidential mediation information has also been proposed as possible justification for disqualifying judges.⁶⁹ The Supreme Court of Florida in *Enterprise Leasing* addressed the certified conflict "on the issue of whether the disclosure of confidential mediation information to the trial judge is in and of itself sufficient to disqualify the trial judge."⁷⁰ The court held "we approve the decision in *Enterprise Leasing*, which held a judge is not automatically disqualified from presiding because of knowledge of confidential mediation information, and disapprove the Fourth District's decision in *Fabber* to the extent that it is inconsistent with this opinion."⁷¹ A party seeking disqualification of a judge in a mediation context must allege specific facts to demonstrate a reasonable belief he could not get a fair trial.⁷²

Florida's supreme court recognized that confidentiality of the proceedings is crucial to mediation by mandating that '[i]f the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court *without comment or recommendation*,' and by further requiring that '[i]f an agreement is reached, it shall be reduced to writing.'⁷³

Comparable rules of procedure similarly restrict what a mediator may report to the court for family⁷⁴ and dependency mediation.⁷⁵

Not only may mediators assert the confidentiality privilege on behalf of the parties, mediators governed by the *Florida Rules for Certified and Court-Appointed Mediators* have an affirmative obligation to do so, including moving for a protective order.⁷⁶ In *Royal Caribbean Corp. v. Modesto*, the par-

67. *Id.*

68. *Hudson*, 600 So. 2d at 9.

69. *See Enterprise Leasing Co. v. Jones*, 789 So. 2d 964 (Fla. 2001).

70. *Id.* at 965.

71. *Id.* In *Fabber v. Wessel*, 604 So. 2d 533 (Fla. 4th Dist. Ct. App. 1992) the trial judge was disqualified from continuing as judge on the case because in the course of denying a motion to compel compliance with the settlement agreement, he was privy to the terms of the parties' alleged agreement. *Id.* at 534.

72. *Enterprise Leasing Co.*, 789 So. 2d at 968.

73. *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517, 519 (Fla. 3d Dist. Ct. App. 1994) (citing FLA. R. CIV. P. 1.730) (emphasis in original).

74. FLA. FAM. L. R. P. 12.740(f).

75. FLA. R. JUV. P. 8.290(o).

76. "A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law." FLA. R. CERT. & CT.-APPTD. MEDIATORS

ties failed to reach a written agreement during court ordered mediation.⁷⁷ Nonetheless, Royal Caribbean moved to enforce an oral mediation agreement and subpoenaed the mediator to testify at the hearing on their motion.⁷⁸ The court of appeal recognized that the privilege afforded to the parties in mediation proceedings, and asserted by the mediator in the trial court, was codified by the Florida Legislature.⁷⁹ Accordingly, it affirmed the trial court's decision to grant the mediator's motion to quash the subpoena and to refuse to hear testimony regarding the mediation.⁸⁰

In a second case involving Royal Caribbean, following court-ordered circuit civil mediation, the mediator submitted a report to the court indicating that the parties had reached total impasse on all issues.⁸¹ Royal Caribbean moved to enforce settlement, claiming that a settlement was reached by the parties and sought to have the court review a document purporting to be the settlement agreement.⁸² The appellate court found that the trial court had departed from the essential requirements of law by ordering an in camera inspection of the purported agreement and holding an evidentiary hearing on Royal Caribbean's motion.⁸³ "In order for a settlement agreement reached during mediation to be binding, FLA. R. CIV. P. 1.730 clearly mandates that it be reduced to writing and executed *both* by the parties and their respective counsel, if any."⁸⁴ If the parties do not effectuate an agreement in accordance with the dictates of rule 1.730(b) of the *Florida Rules of Civil Procedure*, "the confidentiality afforded to parties involved in mediation proceedings must remain inviolate."⁸⁵

10.360. Additionally, "the mediator should not voluntarily testify, and, if subpoenaed, should either file a motion for protective order, or notify the judge in accordance with local procedures, that the mediator is statutorily required to maintain the confidentiality of mediation proceedings." Mediator Qualifications Advisory Panel, Op. 96-005. This is an advisory opinion issued by the Mediator Qualifications Advisory Panel, subsequently renamed Mediator Ethics Advisory Committee.

77. 614 So. 2d 517, 518 (Fla. 3d Dist. Ct. App. 1992).

78. *Id.*

79. *Id.* at 520.

80. *Id.*

81. *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 516 (Fla. 3d Dist. Ct. App. 1994).

82. *Id.*

83. *Id.* at 517.

84. *Id.* *Contra* *Jordan v. Adventist Health Sys.*, 656 So. 2d 200, 202 (Fla. 5th Dist. Ct. App. 1995) (enforcing mediation agreement signed by the parties, but not their counsel, when parties operated under the terms of the mediation agreement).

85. *Gordon*, 641 So. 2d at 517 (citing *Royal Caribbean v. Modesto*, 614 So. 2d 517 (Fla. 3d Dist. Ct. App. 1992)).

Nonetheless, if the parties at mediation do not effectuate an agreement, the real parties in interest, even if not present at the mediation proceedings, are entitled to know about the issues in dispute and mediation efforts.⁸⁶ In a court-ordered mediation between a condominium association and a developer, the parties did not reach agreement.⁸⁷ Subsequent to the mediation, the developer wrote a letter to the individual unit owners advising them of the proceedings and the settlement offer the association had rejected.⁸⁸ Reversing the trial court's order imposing sanctions on the developer, the court of appeal interpreted section 44.102(3) of the *Florida Statutes* to grant a privilege to each party involved in a mediation proceeding, and found nothing in the statute that precluded parties from disclosing communications to other parties, whether present at or absent from the mediation proceeding.⁸⁹

C. Rules of Procedure Impact Confidentiality

Executed mediated agreements survive the mediation process, but must bear the requisite signatures to be recognized as valid by the courts.⁹⁰ Rules of procedure in conjunction with applicable substantive and mediation law provide the answer as to who must sign the agreement. In the circuit civil matter of *City of Delray Beach v. Keiser*, “[a]t the mediation, a handwritten memorandum was prepared, which set forth the terms of a settlement.”⁹¹ The attorney for the City of Delray Beach signed the memorandum, but neither party signed the document.⁹² Subsequent to the mediation, the City Commission declined to approve the settlement.⁹³ The appellate court reasoned that there was no mediation settlement agreement for rule 1.730 of the *Florida Rules of Civil Procedure* requires that parties sign their mediation agreement.⁹⁴ Thus, the court of appeal found that the trial court erred in enforcing the agreement.⁹⁵ “[C]ounsel’s signature, even when executed in the presence

86. *Yacht Club S.E., Inc. v. Sunset Harbour*, 843 So. 2d 917, 918 (Fla. 3d Dist. Ct. App. 2003).

87. *Id.*

88. *Id.*

89. *Id.* at 918–19.

90. FLA. STAT. § 44.102(3) (2002). The privilege for court-ordered mediation provides that “[a]ll oral or written communications in a mediation proceeding, other than an executed settlement agreement, . . . shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.” *Id.* See also additional mediation privileges identified in notes 23–25 *supra*.

91. *City of Delray Beach v. Keiser*, 699 So. 2d 855, 856 (Fla. 4th Dist. Ct. App. 1997).

92. *Id.* at 856.

93. *Id.*

94. *Id.*

95. *Keiser*, 699 So. 2d at 855.

of the party, was insufficient to satisfy the signature requirement of Rule 1.730.”⁹⁶ Conversely, when the parties sign the mediation agreement but counsel do not, the agreement may be upheld by the court.⁹⁷ In *Jordan v. Adventist Health System/Sunbelt, Inc.*, the court found the lack of signatures by counsel was a technical detail, and held that the parties’ signatures were sufficient to bind them to their settlement agreement when the parties had operated under the terms of the agreement.⁹⁸ While attorneys’ signatures may be a technical detail, parties’ signatures are required on circuit civil mediated settlement agreements.

In determining whether mediated agreements should be recognized, family law courts also look to requirements established by the applicable rules of procedure.⁹⁹ In *Graves v. Graves*, the court held that the only way the parties may enter into an enforceable agreement was to follow the rules of procedure, and parties may not avoid the requirements by orally agreeing to an alternative procedure during mediation.¹⁰⁰ During the mediation, the parties reached an oral agreement which they recited before a court reporter.¹⁰¹ The wife refused to sign the written agreement the husband’s attorney prepared by incorporating the terms of the oral agreement.¹⁰² When *Graves* was decided, family mediation matters were governed by *Florida Rules of Civil Procedure*. They are now governed by *Florida Family Law Rules of Procedure*, which specifically address the matter raised in *Graves*, and provide that the mediation agreement may be electronically or stenographically recorded.¹⁰³

Attorneys and mediators must be well-versed in the rules of procedure in their specific courts, for the various rules differ markedly. *Florida Family Law Rules of Procedure* do not bind parties to the agreement if counsel was not present when the mediation agreement was reached, and counsel serves a written objection within ten days from service of a copy of the agreement.¹⁰⁴ Rules governing small claims actions do not require either parties or attor-

96. *Id.* (citing *Gordon*, 641 So. 2d at 517).

97. *Jordan v. Adventist Health Sys./Sunbelt, Inc.*, 656 So. 2d 200 (Fla. 5th Dist. Ct. App. 1995), *rev. denied* 663 So. 2d 630 (Fla. 1995).

98. *Id.* at 202.

99. *Graves v. Graves*, 649 So. 2d 284 (Fla. 2d Dist. Ct. App. 1995).

100. *Id.* at 286.

101. *Id.* at 285.

102. *Id.*

103. FLA. FAM. L. R. P. 12.740(f)(1) (2002).

104. *Id.*; see *Kalof v. Kalof*, 840 So. 2d 365, 366 (Fla. 3d Dist. Ct. App. 2003) (interpreting this rule as applying to the limited circumstance in which counsel for one of the parties leaves the mediation before the settlement agreement is ready, and not establishing a ten-day window within which anyone present at mediation can move to set aside the agreement).

neys to attend mediation if the party sends a representative with full authority to settle.¹⁰⁵ For dependency mediation, parties attending the mediation must sign the written mediation agreement.¹⁰⁶ The parties and participants who must attend are identified in the court order, which also names the parties and participants who are prohibited from attending the mediation sessions.¹⁰⁷

D. *Waiver of Privilege of Confidentiality*

The parties to the mediation hold the mediation confidentiality privilege and may elect to waive it. Should all parties involved in the mediation waive the privilege, the mediator may not assert the privilege on anyone's behalf. An individual party may intentionally or unintentionally waive the privilege. In *McKinlay v. McKinlay*, the wife wrote a letter to her then-attorney informing him that the stipulation agreement she entered into during mediation was not fair, that she was "under severe emotional distress," and pressured into signing the agreement.¹⁰⁸ When the husband's counsel sought to have the mediator testify in response to wife's allegations of intimidation and duress, her counsel objected, asserting that mediation matters are privileged and confidential.¹⁰⁹ "The trial court found that Wife had not waived her statutory privilege," and refused to allow the mediator to testify or proffer testimony.¹¹⁰ The court of appeal reversed and concluded "Wife waived her statutory privilege of confidentiality and that, as a result of the waiver, it was error and a breach of fair play to deny Husband the opportunity to present rebuttal testimony and evidence."¹¹¹ Similarly, another case held "it was proper for the trial court to allow the former husband to testify about the mediation proceeding where the . . . wife sought relief from the plain terms of the settlement agreement . . ."¹¹² "A party seeking relief from a written settlement agreement on the basis of his or her intent [or] thoughts at the time the agreement was entered into may not assert that matters discussed during the negotiations of that agreement are privileged."¹¹³

105. FLA. R. CIV. P. 1.750(e).

106. FLA. R. JUV. P. 8.290(o)(1).

107. FLA. R. JUV. P. 8.290 (l)(1).

108. *McKinlay v. McKinlay*, 648 So. 2d 806, 807 (Fla. 1st Dist. Ct. App. 1995).

109. *Id.* at 808.

110. *Id.* at 809.

111. *Id.* at 810.

112. *Taylor v. Taylor*, 650 So. 2d 662, 663 (Fla. 1st Dist. Ct. App. 1995).

113. *Id.* (citing *McKinlay v. McKinlay*, 648 So. 2d 806, 810 (Fla. 1st Dist. Ct. App. 1995)).

The mediation confidentiality privilege extends to physical evidence.¹¹⁴ In *Chabad House-Lubavitch v. Banks*, the court of appeal found the trial court had erred in admitting into evidence the site plan that was a direct product of the parties' mediation.¹¹⁵ Had the site plan been otherwise discoverable the result would have been different for the mediation privilege, applying only to mediation communications, does not suspend discovery or prevent the introduction of otherwise discoverable evidence.¹¹⁶ In fact, information obtained during mediation may lead to additional discovery requests, and may form the basis for appropriate motions.¹¹⁷ In *Broward School Board v. Cruz*, the School Board received at mediation, for the first time, a report from the Plaintiff's neuropsychologist.¹¹⁸ The report constituted otherwise discoverable evidence, and is therefore distinguishable from the site plan in *Chabad*.¹¹⁹ Previously, the trial court had denied the School Board's request for an independent medical examination of the Plaintiff, based on Plaintiff's representation that he had not placed his neurological condition at issue, had not retained a neurologist, and did not intend to present testimony from a neurologist.¹²⁰ The court of appeal found: "[b]ecause the cause of Cruz's mental condition and, specifically, the change, if any, in his neurological state, was the central issue in this trial, the School Board should have been allowed the opportunity to have its own expert conduct an independent [medical] examination."¹²¹

An ever-growing body of mediation case law responds to the parties' various pleas for court intervention to correct, modify, or set aside mediation agreements. When courts look behind the mediation agreements and take testimony from the parties as to what transpired at mediation, they cast aside confidentiality. In *Haffa v. Haffa*, the wife alleged that the mediation agreement contained a serious scrivener's error, reflecting that her husband was to transfer twenty-five shares of stock to her, when they had agreed the number

114. *Chabad House-Lubavitch v. Banks*, 602 So. 2d 670, 672 (Fla. 4th Dist. Ct. App. 1992).

115. *Id.*

116. FLA. STAT. § 44.102(3) (2002); FLA. R. CIV. P. 1.710(c); FLA. FAM. L. R. P. 12.741(a).

117. In contrast, hearsay evidence as to information learned at mediation is inadmissible. See *Price v. City of Boynton Beach*, 847 So. 2d 1051 (Fla. 4th Dist. Ct. App. 2003) ("[t]estimony of a witness that a . . . mediator had expressed concerns about threats made by a [party] was inadmissible as hearsay").

118. 761 So. 2d 388, 392 (Fla. 4th Dist. Ct. App. 2000), *aff'd*, 800 So. 2d 213 (Fla. 2001).

119. The site plan in *Chabad* was a mediation communication and therefore protected by the mediation privilege. The doctor's report in *Cruz* existed independent of the mediation, was not covered by the privilege, and was otherwise discoverable.

120. *Cruz*, 761 So. 2d at 391.

121. *Id.* at 393.

was 2,505.¹²² The wife's attorney subpoenaed the mediator to testify. Over the mediator's objection, the circuit court judge ordered the mediator to testify on the limited issue of the alleged scrivener's error.¹²³

Courts balance the benefit of honoring confidentiality with the detriment of denying a party the opportunity to seek the relief of modifying or setting aside the mediation agreement. In *D.R. Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach*, the court of appeal directly addressed the issue of confidentiality, focusing on whether the mediation resulted in an executed settlement agreement.¹²⁴

The reason for confidentiality as to statements made during mediation where a settlement agreement is not reached is obvious. Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached. Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling. There is, of course, no confidentiality as to "an executed settlement agreement."¹²⁵

Courts have given parties the opportunity to prove, among other matters, fraud,¹²⁶ extortion,¹²⁷ mutual mistake,¹²⁸ misrepresentation,¹²⁹ and mediator misconduct¹³⁰ as bases for seeking relief from mediation agreements. The section after next will discuss cases pertaining to mediation agreements, interpreted, modified, upheld, or overturned by the courts.

III. APPEARANCE AT MEDIATION

A. *Obligation to Attend Mediation*

The term "voluntary court-ordered mediation" seems oxymoronic. While the process of mediation may occur by operation of law, parties determine their level of participation. Judges do order parties to attend mediation sessions. However, once at mediation, the parties have self-

122. *Haffa v. Haffa*, No. 93-13422-FC12 (Fla. 11th Cir. Ct. 1994). Conversation with mediator Meah R. Tell on September 17, 2003.

123. *Id.*

124. 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

125. *Id.* at 973-74 (citing FLA. STAT. § 44.102(3) (2001)).

126. *Gostyla v. Gostyla*, 708 So. 2d 674 (Fla. 2d Dist. Ct. App. 1998).

127. *Cooper v. Austin*, 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000).

128. *D.R. Lakes, Inc.*, 819 So. 2d at 974.

129. *Still v. Still*, 835 So. 2d 376 (Fla. 3d Dist. Ct. App. 2003).

130. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1095 (Fla. 4th Dist. Ct. App. 2001).

determination and decide whether they will settle all, some, or none of the matters in controversy.¹³¹ Florida courts have sternly sanctioned both parties and attorneys who failed to attend court-ordered mediation sessions. Sanctions include case dismissal, struck pleadings, attorney's fees, and costs charged against attorneys or clients. With the widespread utilization of mediation and relatively new proliferation of rules of procedure specifically geared to the mediation process, case law clarifies the attorney's obligation to attend and advise clients to attend mediation. Attorneys who improperly advise their clients run the risk of irate clients sanctioned by the court and diminished coffers following their personal assessment.

For circuit civil court-ordered mediation, attorneys representing parties have an obligation to both attend and have their clients attend.¹³² In *Carbino v. Ward*, the Fifth District Court of Appeal of Florida found that defendant Ward failed to appear at mediation without good cause despite the fact that he, in good faith, relied on his attorney's advice that he need not attend.¹³³ The appellate court further found that the trial court, upon motion, was obligated to award attorney's fees and costs against the party failing to appear.¹³⁴ "To hold otherwise would substantially weaken the sanction mechanism which the Supreme Court saw fit to make mandatory upon a party's failure to appear at mediation without good cause."¹³⁵ For circuit civil cases,

a party is deemed to appear at a mediation conference if the following persons are physically present:

- (1) The party or its representative having full authority to settle without further consultation;
- (2) The party's counsel of record, if any;
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full author-

131. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310.

132. Rule 1.720(b) of the *Florida Rules of Civil Procedure* delineates who must attend circuit civil (civil cases over \$15,000) mediations. Court orders or stipulations by parties may alter the requirements. *Id.*

133. 801 So. 2d 1028, 1029 (Fla. 5th Dist. Ct. App. 2001).

134. *Id.* at 1031. Rule 1.720(b) of the *Florida Rules of Civil Procedure* provides "If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys' fees and other costs, against the party failing to appear."

135. *Carbino*, 801 So. 2d at 1031.

ity to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.¹³⁶

The *Carbino* court was the first Florida court to address the question of whether a defendant needs to personally appear for mediation when his insurance company sends a representative with full authority to settle up to policy limits.¹³⁷ Interpreting rule 1.720(b), it answered in the affirmative, finding that persons from all three applicable categories were required to be present at the mediation.¹³⁸ Specifically, the court found that sub-section (b)(1) applied "to a party such as a corporation, partnership, incapacitated person, or minor which must appear through a duly authorized representative."¹³⁹ Further, the court found the adjuster, while meeting the settlement requirements of subsection (3), did not meet the requirements of subsection (1) for his authority was only up to policy limits and Plaintiffs' demand was not so limited.¹⁴⁰

Whether a party, representative, or attorney needs to appear at mediation depends on the governing court order and rules of procedure and practice. The Supreme Court of Florida adopts the rules of practice and procedure for conduct of court-ordered mediation.¹⁴¹ The most demanding rule requiring appearance at mediation applies to circuit civil mediation matters.¹⁴² The *Florida Family Law Rule of Procedure* governing appearance at mediation only requires that the named party be physically present at the mediation conference, unless otherwise stipulated by the parties.¹⁴³ Counsel is not obligated to attend in the discretion of the mediator and with agreement by the parties, unless otherwise ordered by the court.¹⁴⁴ Appearances at dependency mediation are both ordered and prohibited by the court.¹⁴⁵ The *Florida Rules of Juvenile Procedure* direct the court to enter an order naming parties and participants who must appear, as well as parties and participants

136. FLA. R. CIV. P. 1.720(b).

137. *Carbino*, 801 So. 2d at 1030.

138. *Id.*

139. *Id.* at 1031.

140. *Id.*; see also Mediator Ethics Advisory Comm., Op. 99-002 (July 3, 1999); Mediator Ethics Advisory Comm., Op. 2001-010 (March 22, 2002); Mediator Ethics Advisory Comm., Op. 2002-001 (March 22, 2002).

141. FLA. STAT. § 44.102(1) (2002).

142. FLA. R. CIV. P. 1.720(b).

143. FLA. FAM. L. R. P. 12.740(d).

144. *Id.* Rule 12.741(2) provides for mandatory sanctions against a party who fails to appear at a duly noticed mediation conference without good cause.

145. FLA. R. JUV. P. 8.290(l).

who are prohibited from attending the mediation.¹⁴⁶ Unlike the other mediation sessions requiring the appearance of parties, in small claims actions an attorney may appear on behalf of a party at mediation if he has full authority to settle without further consultation.¹⁴⁷ A nonlawyer may also appear on behalf of a party with written authority to appear and full authority to settle without further consultation.¹⁴⁸

Courts are sanctioning parties for failing to attend mediation sessions based on their court orders, as well as applicable rules of procedure. In *Transglobal Land Trust v. Balamour*, the court dismissed the landlord tenant case with prejudice for the plaintiff landlord's failure to attend the court ordered mediation and subsequent failure to show cause why the case should not be dismissed for his nonappearance.¹⁴⁹ Similarly, parties who fail to abide by a court order to attend appellate mediation are subject to sanctions, including the award of attorney's fees and mediator fees.¹⁵⁰ A party's obligation to obey a court order to attend mediation is not negated by presence at the mediation by counsel with full authority to settle.¹⁵¹

Attorneys are also the object of court sanctions for their mediation errors. Although rule 1.720(b) of the *Florida Rules of Civil Procedure* only provides for sanctioning parties who fail to appear,¹⁵² trial courts have the inherent authority to appropriately assess attorney's fees and costs.¹⁵³ Attorneys who fail to attend court-ordered mediation and advise their clients that they need not attend may face attorneys' fees and costs assessed against them in favor of the opposing party.¹⁵⁴ Similarly, attorneys who fail to timely file mediation summaries without good cause may face the imposition of sanctions personally against them.¹⁵⁵ When the attorney is the transgressor, "it is more appropriate to impose sanctions against counsel rather than dismiss the appeal, as dismissal would punish the client for the transgressions of her attorney."¹⁵⁶

146. *Id.* Rule 8.290(1)(5) authorizes sanctions against a party or participant who was ordered to attend mediation, but failed to do so without good cause. The court, in its discretion, may impose sanctions.

147. FLA. R. CIV. P. 1.750(e).

148. *Id.*

149. *Transglobal Land Trust v. Balamour*, 9 Fla. L. Weekly Supp. 202 (17th Cir. Ct. Jan. 14, 2002).

150. *Segui v. Margrill*, 844 So. 2d 820, 821 (Fla. 5th Dist. Ct. App. 2003).

151. *Id.*

152. *Fredericks v. Sturgis*, 598 So. 2d 94, 96 (Fla. 5th Dist. Ct. App. 1992).

153. *Nunes v. Ferguson Enters., Inc.*, 703 So. 2d 491 (Fla. 4th Dist. Ct. App. 1997).

154. *Id.*; see also *Dunning v. Metro. Ins. Co.*, 10 Fla. L. Weekly Supp. 39 (Fla. 3d Cir. Ct. Nov. 6, 2002).

155. *Carter-Harris v. Williams*, 764 So. 2d 687, 688 (Fla. 1st Dist. Ct. App. 2000).

156. *Id.*

Trial courts must find a sufficiently high level of misconduct by the party to justify the severe sanction of striking his pleadings.¹⁵⁷ In *Williams v. Udell*, the trial court abused its discretion by striking appellant's pleadings for failing to attend mediation and properly reply to a request for production, when both incidents of misconduct were attributed to the attorney's dereliction of duty.¹⁵⁸ If a court enters a default judgment against a party for failure to attend a court-ordered mediation, the default order "must contain specific findings of the noncomplying party's willful or deliberate refusal to obey the court order."¹⁵⁹ Additionally, the severe sanction of striking pleadings becomes subject to heightened scrutiny when matters such as child custody and support are at issue.¹⁶⁰

B. *Authority to Settle at Mediation*

Key to a determination of whether the appropriate people appeared for mediation is whether they had the requisite authority to settle. No statute, rule, or court order requires that parties settle during mediation sessions. "There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle."¹⁶¹ Courts and rules may require authority to settle; they do not require intent to settle, let alone actual settlement. Florida's statutory definition of mediation clearly states, "decision making authority rests with the parties."¹⁶²

Courts have levied sanctions against parties who sent representatives to mediation without authority to settle. In *Physicians Protective Trust Fund v. Overman*, the circuit court judge ordered the entire board of trustees to attend the resumption of mediation after the self-insured trust failed to send a representative with authority to settle the case to the court-ordered mediation.¹⁶³ The court of appeal held the lower court had not departed from the essential

157. *Williams v. Udell*, 690 So. 2d 732, 733 (Fla. 4th Dist. Ct. App. 1997).

158. *Id.* at 732-33.

159. *Rodriguez v. Kalish*, 766 So. 2d 411, 411 (Fla. 3d Dist. Ct. App. 2000); *see also* *Smith v. Wal-Mart*, 835 So. 2d 353 (Fla. 1st Dist. Ct. App. 2003) (reversing trial court's dismissal of case and remanding for an explicit determination whether party's failure to attend mediation was willful).

160. *Brownell v. Brownell*, 685 So. 2d 78, 79 (Fla. 2d Dist. Ct. App. 1996).

161. *Avril v. Civilmar*, 605 So. 2d 988, 990 (Fla. 4th Dist. Ct. App. 1992).

162. FLA. STAT. § 44.1011(2) (2002).

163. 636 So. 2d 827, 827-29 (Fla. 5th Dist. Ct. App. 1994). The mediator had adjourned the mediation because the representative from Physicians Protective Trust had no dollar authority to settle the case. Subsequently, the Overmans filed a motion for sanctions pursuant to rule 1.720(b) of the *Florida Rules of Civil Procedure*. *Id.*

requirements of law and declined to interfere by certiorari.¹⁶⁴ Similarly, in *Semiconductors, Inc. v. Golasa*, the trial court sanctioned the petitioner for sending a representative and an attorney to mediation who were not authorized to pay anything to settle the case.¹⁶⁵ The Fourth District Court of Appeal denied the petition for writ of certiorari seeking to overturn the court order.¹⁶⁶ Chief Justice (then Judge) Anstead, dissenting, aptly noted:

Mediation is an excellent means of providing the parties with an opportunity to come together in a non-adversarial setting under the guidance of an expert at dispute resolution to determine if they can agree to a solution of their dispute without the need for a full-blown court trial and all the baggage and risks such a trial involves.¹⁶⁷

He continued: "However, mediation is not designed to *force* a settlement in any case, especially those cases where the lines are so clearly and solidly drawn that the parties, in absolute faith, simply take diametrically opposed positions that ultimately require a court-imposed resolution after a trial on the merits."¹⁶⁸

Judge Anstead had highlighted the importance of parties' self-determination in the mediation process.¹⁶⁹ Precisely because mediation offers the opportunity to come together and share information and perspectives, parties may alter their once diametrically opposed positions. For mediation to truly offer a settlement opportunity, the parties must have the ability to change their minds, should they see fit. Consequently, sending people who have "marching orders" not to settle is a waste of the participant's time and energy.¹⁷⁰ On the other hand, sending people who decide not to settle after participating in the mediation is most appropriate.

Court orders may equate failing to appear for mediation without full authority to settle with failing to appear at all.¹⁷¹ Consequently, if parties reach agreement, they may not later look to overturn it based on inadequate author-

164. *Id.* at 829.

165. *Semiconductors, Inc. v. Golasa*, 525 So. 2d 519, 519 (Fla. 4th Dist. Ct. App. 1988) (per curiam).

166. *Id.*

167. *Id.* at 519–20 (Anstead, J., dissenting).

168. *Id.* at 520.

169. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310.

170. See FLA. R. CIV. P. 1.720(b) (setting attendance requirements and mandatory sanctions).

171. *W. Waste Indus., Inc. v. Achord*, 632 So. 2d 680, 681 (Fla. 5th Dist. Ct. App. 1994).

ity to settle.¹⁷² “Since agreement was reached by the parties at mediation, it is nonsensical to say that petitioner was not present at mediation.”¹⁷³

IV. COURTS SEEK TO UPHOLD MEDIATION AGREEMENTS

A. *Mediation Environment*

Inevitably, when people enter into settlement agreements, some will try to renege on their agreements. Courts will honor the parties’ fundamental right to contract and enforce the contracts even when the bargain seems to favor one side.¹⁷⁴ “The incentive to file an action, impulsively settle, then challenge the settlement after final judgment would permit parties to manipulate the privileges of litigation, waste judicial resources, and compromise finality in these judgments.”¹⁷⁵

Parties looking to overturn settlement agreements have limited bases for doing so. “In fact, the reasons for such limitations are even more compelling in the case of a mediated settlement agreement.”¹⁷⁶ In *Crupi v. Crupi*, the appellate court, determining whether to enforce a marital settlement, agreed with the trial court “that three Xanax pills, and anxiety and pressure to settle are insufficient proof of coercion necessary to set aside such an agreement. Otherwise, few, if any, mediated settlement agreements would be enforceable.”¹⁷⁷ Identifying the safeguards available to litigating parties who participate in court-ordered mediation, another court said, “[m]ediation agreements are reached under court supervision, before a neutral mediator. The mediation rules create an environment intended to produce a final settlement of the issues with safeguards against the elements of fraud, overreaching, etc., in the settlement process.”¹⁷⁸ Courts have also given weight to other factors usually present in court-ordered mediation cases, including representation by counsel and access to discovery, experts, and the court.¹⁷⁹ Addi-

172. *Id.* at 681–82.

173. *Id.* at 682 n.1.

174. *Petracca v. Petracca*, 706 So. 2d 904, 913 (Fla. 4th Dist. Ct. App. 1998).

175. *Macar v. Macar*, 803 So. 2d 707, 713 (Fla. 2001).

176. *Crupi v. Crupi*, 784 So. 2d 611, 614 (Fla. 5th Dist. Ct. App. 2001).

177. *Id.*

178. *Trowbridge v. Trowbridge*, 674 So. 2d 928, 931 (Fla. 4th Dist. Ct. App. 1996).

179. *See Petracca*, 706 So. 2d at 904. The parties reached a settlement agreement in their dissolution of marriage action after engaging in discovery for two years with each continuously represented by counsel, and the wife having hired an accountant to determine the family finances. *Id.* Although the *Petracca* parties did not reach their agreement through mediation, the factors the court considers (distinguishing pre- and post-litigation) are factors usually present in court-ordered mediation cases. *Id.* at 905–06. *See also Macar*, 803 So. 2d at 707.

tionally, courts will consider that the parties voluntarily entered into a mediation agreement.¹⁸⁰

B. *Intent to be Bound by the Mediation Agreement*

To display the parties' intent to reach a final settlement, mediated agreements must be in writing, although they may be handwritten.¹⁸¹ Further, the agreements need to bind the parties as to the essential terms,¹⁸² but may be "bare bones" agreements.¹⁸³ When parties disagree, courts determine whether or not they meant to be bound by the terms of their agreements. In a dependency matter, parents who were represented by counsel entered into a mediation agreement with the Department of Health and Rehabilitative Services ("HRS"), consenting to the withholding of adjudication of dependency for the children provided the parents complied with specific tasks.¹⁸⁴ Shortly thereafter, HRS filed an affidavit alleging parents' noncompliance, and moved for an adjudication of dependency.¹⁸⁵ The trial court, following a hearing on the matter, issued an order declaring the children dependent.¹⁸⁶ While acknowledging that the mediation agreement was not a model of clarity, the appellate court denied parents' motion for rehearing, having determined that the parents had agreed to forgo procedures they would otherwise have been entitled to for the dependency proceedings, and had also agreed that should they fail to comply with the mediation agreement their children would be adjudicated dependent.¹⁸⁷

Nonetheless, mediated agreements may not be used to deny parents substantive due process rights in termination of parental rights cases.¹⁸⁸

180. *In re BB.*, 820 So. 2d 409, 413 (Fla. 3rd Dist. Ct. App. 2002). The court expressed great distress "by the ease with which the father [was] permitted to needlessly expend the scant resources of the DCF and the dependency court . . . with insufficient evidence in an effort to renege on a mediated settlement agreement he voluntarily entered into with the child's mother." *Id.*

181. *Singer v. Singer*, 652 So. 2d 454, 455 (Fla. 4th Dist. Ct. App. 1995) (recognizing handwritten agreements); *Wilson v. Forte Hotels, Inc.*, 632 So. 2d 271 (Fla. 1st Dist. Ct. App. 1994) (reversing trial court's order enforcing alleged mediation agreement that was not in writing); *Cohen v. Cohen*, 609 So. 2d 785 (Fla. 4th Dist. Ct. App. 1992) (requiring mediated agreements to be written).

182. *Bowen v. Larry Gross Constr.*, 781 So. 2d 464, 466 (Fla. 5th Dist. Ct. App. 2001).

183. *Stempel v. Stempel*, 633 So. 2d 26, 26-27 (Fla. 4th Dist. Ct. App. 1994).

184. *A.G. v. Dep't of Children & Family Servs.*, 716 So. 2d 792 (Fla. 4th Dist. Ct. App. 1998).

185. *Id.* at 793.

186. *Id.*

187. *Id.* at 794.

188. *In re S.S.*, 723 So. 2d 344, 347 (Fla. 4th Dist. Ct. App. 1998).

“Substantive due process requires that grounds for termination of parental rights be shown by clear and convincing evidence before the State may sever the rights of a parent in their natural child.”¹⁸⁹ Construing a mediation agreement in a termination of parental rights case, the district court of appeal expressed concern with the mediated consent-to-termination clause.¹⁹⁰ The court was troubled by the judge’s decision to terminate parental rights based on three weeks of noncompliance with a portion of the agreement, when the mediation agreement provided a ninety day period within which to satisfy the agreement’s requirements, and the hearing was held less than ninety days from the date of the agreement.¹⁹¹ Despite the mediation agreement with its consent-to-termination of parental rights clause, the trial court had the obligation to consider the best interests of the children, and the state retained the burden to establish the elements required for termination of parental rights cases.¹⁹² As the record did not support the termination of parental rights, the case was reversed and remanded for further proceedings.¹⁹³

In a dissolution of marriage proceeding, the court was called upon to determine if a provision in a handwritten mediated agreement was an agreement between the parties or merely their agreement to agree in the future.¹⁹⁴ The mediation agreement read: “The parties agree to a ninety day per year cumulative cohabitation clause the exact language of which shall be agreed upon by counsel and the parties.”¹⁹⁵ Finding reversible error by the trial court, the court of appeal concluded that the provision, located in a mediated agreement that was admitted into evidence at trial and incorporated into the final judgment, was an agreement that had gone into effect.¹⁹⁶ Furthermore, by virtue of its incorporation, the mediation “agreement was elevated to the status of judgment to be interpreted, rather than a contract to be enforced.”¹⁹⁷

C. *Finality of Mediation Agreements*

Settlements are highly favored, and courts will seek to enforce them whenever possible.¹⁹⁸ “With the parties’ execution of an agreement, media-

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 346.

193. *In re S.S.*, 723 So. 2d at 347.

194. *Singer v. Singer*, 652 So. 2d 454, 455 (Fla. 4th Dist. Ct. App. 1995).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla.1985); *Treasure Coast v. Ludlum Constr. Co.*, 760 So. 2d 232, 234 (Fla. 4th Dist. Ct. App. 2000) (citing *Murchinson v.*

tion contemplates a prompt and final resolution of the case.”¹⁹⁹ “The fact that one party to the agreement apparently made a bad bargain is not sufficient ground, by itself, to vacate or modify a settlement agreement.”²⁰⁰ “Nor is the fact that the complaining party has received incompetent legal advice a basis for vacating an agreement in a dissolution proceeding.”²⁰¹ In *Tubbs v. Tubbs*, the court of appeal instructed the trial court to enforce the parties’ handwritten mediation agreement, signed by the parties, their attorneys, and the mediator, despite the fact the agreement appeared to be slanted in favor of the husband.²⁰²

“[C]ases settled in mediation are especially unsuited for the liberal application of a rule allowing rescission of a settlement agreement based on unilateral mistake.”²⁰³ In *Sponga v. Warro*, during mediation, the parties settled a negligence suit arising from a car accident for \$12,500.²⁰⁴ Alleging mistake or “newly discovered evidence,” Ms. Warro sought relief from judgment based on her doctor’s serious error regarding her injuries, and her reliance on his erroneous report.²⁰⁵ Following mediation, her doctor cor-

Grand Cypress Hotel, 13 F.3d 1483, 1486 (11th Cir. 1994); see also *Metro. Dade County v. Fonte*, 683 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1996)).

199. *Trowbridge v. Trowbridge*, 674 So. 2d 928, 931 (Fla. 4th Dist. Ct. App. 1996).

200. *Tubbs v. Tubbs*, 648 So. 2d 817, 818 (Fla. 4th Dist. Ct. App. 1995) (citing *Casto v. Casto*, 508 So. 2d 330, 334 (Fla. 1987)); *Micale v. Micale*, 542 So. 2d 415, 417 (Fla. 4th Dist. Ct. App. 1989), *rev. dismissed*, 548 So. 2d 663 (Fla. 1989); *Cladis v. Cladis*, 512 So. 2d 271, 274 (Fla. 4th Dist. Ct. App. 1987).

201. *Tubbs*, 648 So. 2d at 818 (citing *Casto*, 508 So. 2d at 334; *Cladis*, 512 So. 2d at 274)).

202. *Id.* The *Tubbs* court used the *Casto* test in determining whether to set aside the parties’ settlement agreement. *Id.* Subsequently, the Supreme Court of Florida in *Macar v. Macar*, 803 So. 2d 707 (Fla. 2001) addressed the issue of whether final judgments which incorporate marital settlement agreements achieved after commencement of litigation should be subject to challenges based on *Casto v. Casto*, 608 So. 2d 330 (Fla. 1987). *Macar*, 803 So. 2d at 708–09. The court concluded that they were not, and should be controlled by *Florida Rule of Civil Procedure* 1.540. *Id.* at 709. See also *Casto*, 508 So. 2d at 330, for two grounds established by the Supreme Court to set aside or invalidate a postnuptial agreement: (1) “fraud, deceit, duress, coercion, misrepresentation, or overreaching” by a party in reaching the agreement, and (2) “unfair or unreasonable provision for [a] spouse” given the parties’ circumstances. *Casto*, 508 So. 2d at 333. Once the spouse establishes that the agreement is unreasonable, a presumption exists that either (a) the defending spouse concealed information, or (b) the challenging spouse lacked knowledge. The defending spouse then has the burden to rebut the presumption by showing (a) full, frank disclosure of marital property and income of parties to challenging spouse prior to signing agreement, or (b) general knowledge by the challenging spouse of the parties’ income and general and approximate knowledge of the marital property. *Id.*

203. *Sponga v. Warro*, 698 So. 2d 621, 625 (Fla. 5th Dist. Ct. App. 1997).

204. *Id.* at 623.

205. *Id.*

rected his report, finding (for the first time) a preexisting condition aggravated by the accident for which he anticipated future treatment.²⁰⁶ The court of appeal declined to apply the concept of newly discovered evidence, and determined that Ms. Warro entered into the mediated settlement agreement based on unilateral mistake.²⁰⁷ As a matter of law, the court concluded that she was not entitled to withdraw her settlement agreement based on errors in her doctor's report.²⁰⁸ "The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are foregone."²⁰⁹ "The finality of it once the parties have set down their agreement in writing is critical."²¹⁰

"Mediation, like arbitration, is an *alternative dispute* resolution device. It is not to be engaged in casually or carelessly."²¹¹ A heightened standard of review applies when courts consider vacating a final judgment that followed a mediated settlement agreement.²¹² When a trial court sets aside a judgment based on a settlement agreement, it is also setting aside the agreement entered into by the parties. "[M]ore stringent principles of law apply in setting aside a contract than in setting aside a judgment."²¹³

As parties rely on the finality of their mediation agreements, third parties may also rely on the agreements to seek court determination of their rights.²¹⁴ In *Robbins v. Jackson National Life Insurance Co.*, the insurance company brought an action for declaratory judgment to establish its right to continue to sell insurance to the former wife who was insuring her former husband's life.²¹⁵ Based on the parties' mediation agreement, the former wife had an insurable interest in the life of her former husband.²¹⁶ She was, therefore, allowed to purchase policies insuring his life totaling \$200,000.²¹⁷ In another dissolution of marriage matter, parties stipulated during "mediation that the husband would maintain a life insurance policy in the amount of \$200,000 naming the minor children as beneficiaries."²¹⁸ The trial court's

206. *Id.*

207. *Id.* at 624.

208. *Sponga*, 698 So. 2d at 625.

209. *Id.*

210. *Id.*

211. *Tilden Groves Holding Corp. v. Orlando/Orange County Expressway*, 816 So. 2d 658, 660 (Fla. 5th Dist. Ct. App. 2002) (quoting *Sponga*, 698 So. 2d at 625 (Fla. 5th Dist. Ct. App. 1998)).

212. *Id.*

213. *Id.* (referencing *Smiles v. Young*, 271 So. 2d 798, 799 (Fla. 3d Dist. Ct. App. 1973)).

214. *Robbins v. Jackson Nat'l Life Ins. Co.*, 802 So. 2d 476 (Fla. 2d Dist. Ct. App. 2001).

215. *Id.* at 477.

216. *Id.*

217. *Id.*

218. *Burton v. Burton*, 697 So. 2d 1295, 1296 (Fla. 1st Dist. Ct. App. 1997).

decision to require the husband to maintain only \$100,000 in insurance was reversible error.²¹⁹

D. *Enforcement of Mediation Agreements*

When enforcing settlement agreements, courts may not fashion their own remedies.²²⁰ In *Treasure Coast v. Ludlum Construction*, the parties following mediation reached a settlement, which provided in relevant part: "If any payment is more than ten days late then the Plaintiff will be entitled to a judgment upon Affidavit against the Defendant for \$65,000.00 less payments made."²²¹ Subsequent to Ludlum making payment seven days beyond the ten day grace period, Treasure Coast moved for final judgment.²²² Finding that entry of an order for the full amount shocked its conscience, the trial court ordered Ludlum to pay interest on its late payment.²²³ Consequently, the court of appeal held that the trial court erred in failing to enforce the unambiguous terms of the agreement, and in substituting its own remedy.²²⁴

Similarly, the trial court cannot "interfere with the parties' agreement by finding it unconscionable and refusing to enforce it."²²⁵ In *Wells v. Wells*, the parties, both of whom were represented by counsel, entered into a mediation agreement.²²⁶ Pursuant to the agreement:

the husband was to have the exclusive use and possession of the marital home but, . . . in the event he were ever thirty days late in any child support payment, the husband would forfeit his interest in the home and quit-claim it to the wife (unless the lateness were due to injury or disability, in which case the home would be sold and the proceeds divided equally between the parties).²²⁷

The mediation agreement also provided that the husband would transfer to the wife the \$15,863.54 balance in an annuity fund, and if the annuity decreased in value, the husband would pay the difference in value to the wife.²²⁸ The agreement specifically stated that the transfer of the annuity

219. *Id.*

220. *Treasure Coast v. Ludlum Constr. Co.*, 760 So. 2d 232, 234 (Fla. 4th Dist. Ct. App. 2000).

221. *Id.* at 233.

222. *Id.* at 233–34.

223. *Id.* at 234.

224. *Id.*

225. *Wells v. Wells*, 832 So. 2d 266, 269 (Fla. 4th Dist. Ct. App. 2002).

226. *Id.* at 268.

227. *Id.*

228. *Id.*

balance was “in full and complete payment of any child support arrearage” through the execution date of the mediation agreement.²²⁹

The trial court found that the former husband owed the former wife \$696 (the decrease in value of the annuity).²³⁰ The trial court characterized the \$696 payment as a property settlement, and determined that a judgment in that amount could be entered against the husband, but he could not be held in contempt.²³¹ The court of appeal disagreed, reasoning that since the obligation was “made to discharge the husband’s child support arrearage, it was enforceable by contempt.”²³²

“Despite the trial court’s determination that the husband was more than thirty days late in paying child support, the court refused to enforce that portion of the mediation agreement, *sua sponte* finding it unconscionable.”²³³ The court of appeal found no justification for the trial court’s invalidation of the mediation agreement.²³⁴

In sum, the former husband agreed to the marital settlement provision requiring him to transfer his interest in the marital home if he made a child support payment thirty days or more late. He did not challenge this provision either before or after it was incorporated into the final judgment.²³⁵

“Bad domestic bargains—meaning unfair or unreasonable property and monetary settlement agreements—are nevertheless enforceable so long as they are knowing, voluntary, and not otherwise against public policy.”²³⁶

Additionally, only when a term in a marital settlement agreement is ambiguous may the trial court consider extrinsic evidence to clarify the language in the agreement.²³⁷ In *Levitt v. Levitt*, the parties entered into a handwritten mediation agreement, superseded by a marital settlement agreement specifically stating that it was the entire agreement of the parties.²³⁸ The

229. *Id.*

230. *Wells*, 832 So. 2d at 268.

231. *Id.*

232. *Id.*; see also *Kea v. Kea*, 839 So. 2d 903, 904 (Fla. 1st Dist. Ct. App. 2003) (reversing trial court’s finding of contempt because contempt is only proper if the unpaid debt is for alimony or child support, and husband’s debt, as defined in the mediation agreement, was neither).

233. *Wells*, 832 So. 2d at 268.

234. *Id.* at 269.

235. *Id.*

236. *Id.* (quoting *Petracca v. Petracca*, 706 So. 2d 904, 911 (Fla. 4th Dist. Ct. App. 1998) (discussing *Castro v. Castro*, 508 So. 2d 330, 334 (Fla. 1987))).

237. *Levitt v. Levitt*, 699 So. 2d. 755, 757 (Fla. 4th Dist. Ct. App. 1997).

238. *Id.* at 756.

agreement provided “that the former husband [would] pay the balance of . . . wife’s attorney’s fees in an amount not to exceed \$12,500, and that ‘payment of this amount is subject to the [h]usband’s review of and consent to the [w]ife’s attorney’s billing records, which consent shall not be unreasonably withheld.’”²³⁹ Finding the attorney’s fee provision ambiguous, the trial court reviewed extrinsic evidence, and determined that the parties intended to have a flat fee arrangement.²⁴⁰ The court of appeal, construing the marital settlement agreement as a matter of law, was “on equal footing with the trial court as interpreter of the written document.”²⁴¹ As the terms of the agreement were clear and unambiguous, “the parties’ intent must be gleaned from the four corners of the document.”²⁴² Accordingly, the case was reversed and remanded for the trial court’s determination of whether the former husband reasonably or unreasonably withheld his consent to pay attorney’s fees of the former wife.²⁴³

Trial courts must enforce valid mediated settlement agreements in strict accordance with their terms.²⁴⁴ It is error for a trial court to require a restrictive covenant in a deed when the mediation agreement only provided for “immediate erection of a hog wire fence and the future erection of a chain link fence,”²⁴⁵ or to require signing an easement which contained terms and conditions parties had not agreed to in their mediated settlement agreement.²⁴⁶ Courts of appeal similarly reverse family courts that do not follow the plain language of the mediation agreements or go beyond the agreed-upon language. When the mediation agreement provided that the husband could claim tax deductions for the children as long as he was current in his child support and alimony payments, the general master erred by ruling that the husband was not entitled to take the tax deduction for his failure to pay private school tuition.²⁴⁷ Similarly, when issues of child custody had been satisfactorily resolved by the parties in their mediation agreement, and adopted by the court recognizing the provisions were in the children’s best

239. *Id.*

240. *Id.*

241. *Id.*

242. *Levitt*, 699 So. 2d at 756.

243. *Id.* at 757.

244. *M & C Assocs. v. State*, 682 So. 2d 640 (Fla. 2d Dist. Ct. App. 1996).

245. *Boozer v. NCNB Nat’l Bank of Fla.*, 641 So. 2d 905 (Fla. 2d Dist. Ct. App. 1994).

246. *Sinclair v. Clay Elec. Coop., Inc.*, 584 So. 2d 1065, 1067 (Fla. 5th Dist. Ct. App. 1991).

247. *Layman v. Layman*, 738 So. 2d 466, 467 (Fla. 4th Dist. Ct. App. 1999). “The agreement provided that the husband could claim the tax deductions if he was current in child support and alimony payments.” *Id.* “The plain language of the agreement does not label the husband’s portion of the private school tuition as child support.” *Id.*

interests, the court went beyond the agreement when it designated primary and secondary residential parents.²⁴⁸ Nonetheless, the court of appeal declined to disturb the judge's findings, reasoning that the designation of primary residential parent had no significance in the context of the final judgment.²⁴⁹

E. Interpretation of Mediation Agreements

As with other settlement agreements, parties seek court intervention when they disagree on the interpretation or implementation of their mediation agreements. In *Broward County v. LaPointe*, the parties settled their eminent domain case in mediation, and their settlement terms were incorporated into a stipulated final judgment.²⁵⁰ "The parties' settlement agreement provided that the court was to reserve jurisdiction over the 'amount of all reasonable costs and attorney's fees, including all costs of environmental contamination issues.'"²⁵¹ The court of appeal, construing the contract as a matter of law, determined that since there was no facial ambiguity, the portion of the agreement at issue must be afforded its plain meaning.²⁵² Finding the omission of 'attorney's fees' in the modifying clause (which only referred to 'costs') significant, the court of appeal construed the parties' agreement to allow reimbursement for costs dealing with environmental contamination issues, but not for attorney's fees for the "administrative and regulatory process."²⁵³

In *Dows v. Nike, Inc.*, "[b]oth [parties] contended that there was no ambiguity in the settlement agreement and it should be enforced."²⁵⁴ Further, each side argued that their interpretation, based on the plain meaning of the settlement agreement, should prevail.²⁵⁵

The parties had entered into a pre-suit mediation agreement that established a three-tiered settlement structure dependent on an independent examining physician's opinions.²⁵⁶ They subsequently entered into a final agreement, superseding the original handwritten conceptual agreement, in which they chose a physician who would answer specific questions that would de-

248. *Goins v. Goins*, 762 So. 2d 1049, 1051 (Fla. 5th Dist. Ct. App. 2000)

249. *Id.* at 1052.

250. 685 So. 2d 889, 891 (Fla. 4th Dist. Ct. App. 1996).

251. *Id.* at 892.

252. *Id.*

253. *Id.* at 892-93.

254. *Dows v. Nike, Inc.* 846 So. 2d 595, 600 (Fla. 4th Dist. Ct. App. 2003).

255. *Id.*

256. *Id.* at 597.

terminate the minor's compensation.²⁵⁷ The parties agreed to ask the physician (1) whether the minor ever suffered from osteomyelitis as a result of the incident, and (2) if he suffered from osteomyelitis, whether he will require any treatment to the injured area?²⁵⁸ In the event the physician answered no to the second question, the minor claimant and his guardian agreed to accept \$100,000.²⁵⁹ If however, the physician answered yes, they agreed to accept \$300,000.²⁶⁰

Nike argued that they were only responsible for paying \$100,000 because the physician responded the child would not require further treatment for osteomyelitis.²⁶¹ The Dows argued that Nike was required to pay \$300,000 because the physician answered that their son would require further treatment to the injured area.²⁶² The court of appeal did not read the question as limiting future treatment for osteomyelitis only, reversed the trial court's order compelling the \$100,000 settlement, and directed the court to enter an order directing Nike to pay the Dows \$300,000.²⁶³

Courts may define terms in mediation agreements when parties have failed to do so.²⁶⁴ They may also require renegotiation of settlement agreements.²⁶⁵ A marital settlement agreement reached during mediation provided that the husband would use his "best efforts" to complete a real estate purchase within a specified period of time.²⁶⁶ Further, "[t]he agreement provided that '[i]f despite all his best efforts and through no fault of his own, the transaction shall not be closed, then the parties' marital settlement agreement shall be subject to renegotiation.'"²⁶⁷ Finding the husband was not obligated to complete the transaction based on the circumstances, the court of appeal concluded that the contingency in the agreement had occurred, necessitating renegotiation of the marital settlement agreement.²⁶⁸

When parties use an undefined term in their mediation agreement, they are bound by the interpretation which the court gives the term.²⁶⁹ In a medi-

257. *Id.* at 598.

258. *Dows*, 846 So. 2d at 598.

259. *Id.*

260. *Id.*

261. *Id.* at 600.

262. *Id.*

263. *Dows*, 846 So. 2d at 601.

264. *See Bowen v. Larry Gross Constr., Inc.* 781 So. 2d 464, 466 (Fla. 5th Dist. Ct. App. 2001).

265. *Faith v. Faith*, 709 So. 2d 600, 601 (Fla. 3d Dist. Ct. App. 1998).

266. *Id.* at 600.

267. *Id.* at 601.

268. *Id.*

269. *See Bowen*, 781 So. 2d at 466.

ated agreement between a “homeowner” and a general contractor, the parties entered into an agreement to “repair cracks in plaster.”²⁷⁰ The homeowner wanted replacement of the drywall and plaster, while the contractor maintained that his repair would not be noticeable and would be permanent.²⁷¹ Although the parties did not agree on the definition of the term “repair” as used in the mediation agreement, the court held them to their agreement.²⁷²

Even though the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto.²⁷³

Parties to mediation agreements do not always agree on issues having to do with breach or default, and resultant consequences or damages. Courts determining whether mediation agreements have been materially breached will look to the parties’ agreement and the applicable established body of law. In a landlord-tenant case, the appellate body (circuit court) found no breach of the mediation agreement and no basis at law to uphold the default judgment for eviction.²⁷⁴ Prior to the court hearing the landlord’s complaint for tenant eviction, the parties reached agreement at mediation and the case was dismissed.²⁷⁵ Pursuant to the mediation agreement, a breach of the agreement provided for a reopening of the case, placing the parties in the position they were prior to mediation.²⁷⁶ Therefore, as the landlord had not given the notice required by statute prior to the suit, the defects could not be corrected on remand, and even if the tenant had breached the agreement, the court was not justified in automatically entering a default judgment.²⁷⁷ Consequently, the appellate court ordered entry of judgment in favor of the tenant.²⁷⁸

In *Spanish Broadcasting Systems of Florida, Inc. v. Grillone*, the trial court found that Spanish Broadcasting was “in wilful breach of the terms of the settlement agreement it entered into with [Grillone] at mediation and has

270. *Id.* at 465.

271. *Id.*

272. *Id.* at 466.

273. *Id.*

274. *Hodgson v. Jones*, 6 Fla. L. Weekly Supp. 758, 758–59 (17th Cir. Ct. Oct. 29, 1999)

275. *Id.* at 758.

276. *Id.* at 759.

277. *Id.*

278. *Id.*

indicated to the Court that it will not honor the terms of the mediation agreement."²⁷⁹ Consequently, the court of appeal found the trial court had not abused its discretion in imposing sanctions and in declining to reduce the amount of sanctions it had imposed against Spanish Broadcasting.²⁸⁰ However, in another case involving the media, notwithstanding the fact that late payment by an advertiser to a television station was in violation of their mediation agreement, the court found the advertiser was not in default.²⁸¹ The court reasoned that the television station accepted payment and allowed the advertisement, from which the advertiser could have concluded it was not in default.²⁸² Additionally, the court determined that at a minimum, the television station had a duty to provide notice before seeking an *ex parte* final judgment.²⁸³ The court of appeal vacated the final judgment after default, and notably, ordered the parties to comply with their mediation agreement.²⁸⁴

Similarly, in a family law matter, the court did not find the former husband's two-day delay in making the first payment pursuant to the parties' settlement agreement to be a material breach.²⁸⁵ Distinguishing this case from *Treasure Coast v. Ludlum Construction Co.*,²⁸⁶ the court noted that the case at bar was not a commercial transaction, and further that the mediation agreement did not specify that time was of the essence, and did not provide a grace period to put the party on notice that a short delay would accelerate payments or trigger default.²⁸⁷ Interestingly, in a circuit civil case between a college and a former employee, the court of appeal considered the same factors and reached the same result, deciding the case consistent with the family, rather than the commercial case.²⁸⁸ The parties' settlement agreement reached at mediation provided that Edward Waters College would pay Johnson's back salary and wages in full by March 31, 1997.²⁸⁹ When the college tendered payment one day late, Johnson invoked the default provision of the agreement permitting entry of judgment in the amount of \$250,000.²⁹⁰ De-

279. 731 So. 2d 160 (Fla. 3d Dist. Ct. App. 1999) (quoting the trial court).

280. *Id.*

281. *WFTV, Inc. v. BA Sys. Co.*, 9 Fla. L. Weekly Supp. 130, 130 (15th Cir. Ct. Jan. 31, 2002).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Rose v. Ditto*, 804 So. 2d 351, 353 (Fla. 4th Dist. Ct. App. 2001) (discussing *Treasure Coast v. Ludlum Constr. Co.*, 760 So. 2d 232, 234 (Fla. 4th Dist. Ct. App. 2000)).

286. 760 So. 2d 232 (Fla. 4th Dist. Ct. App. 2000).

287. *Rose*, 804 So. 2d at 353.

288. *See Edward Waters Coll., Inc. v. Johnson*, 707 So. 2d 801 (Fla. 1st Dist. Ct. App. 1998).

289. *Id.* at 802.

290. *Id.*

termining 1) that the settlement agreement contained no recital that time was of the essence; 2) the College's failure caused no hardship; and 3) Johnson made no post-default demand for payment, the court of appeal concluded any breach which may have occurred was not material to the performance of the contract.²⁹¹

F. *Parties Decide Mediation Agreement Coverage and Terms*

In mediation, parties may agree to resolve matters beyond those cognizable in the underlying litigation.²⁹² In *M & C Associates, Inc. v Florida Department of Transportation*, the parties resolved an eminent domain proceeding through mediation.²⁹³ The stipulated final judgment incorporated their mediation agreement, in which they agreed that the court would "reserve jurisdiction to assess any damage to pool caused by construction."²⁹⁴ The trial court struck M & C Associates' motion to enforce this provision determining that construction costs were not recoverable in eminent domain proceedings.²⁹⁵ Finding that the trial court and the parties were bound by the agreement, the court of appeal reversed and remanded to the trial court with instructions to address the pool damage claim.²⁹⁶

The fact that construction damages are not generally recoverable as severance damages is not a defense to enforcement of the settlement agreement. There is no requirement that the terms of a settlement agreement be confined to issues cognizable in the litigation giving rise to the dispute. In fact, cases are often settled precisely because the parties agree to assume obligations or confer rights that a jury or the trial court would be unable to reach.²⁹⁷

This is particularly important in dissolution of marriage matters when parties may wish to address issues such as children's higher education or grandparents' visitation rights:

The bench and bar have for years now encouraged divorcing parents to resolve their differences through mediation. In effect, parents have been urged to make their own law, in the hope that they

291. *Id.*

292. *M & C Assoc. v. State*, 682 So. 2d 640 (Fla. 2d Dist. Ct. App. 1996).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 641.

297. *M & C Assoc.*, 682 So. 2d at 640-41 (internal citations omitted).

can better live with a decision that is their own, rather than a decision that is externally imposed.²⁹⁸

V. COURTS OVERTURN MEDIATION AGREEMENTS AS REQUIRED BY LAW

A. Mediator Misconduct

During settlement, the mediation process offers safeguards to the parties that should decrease the occurrence of coercion and increase the likelihood courts will enforce the agreements.²⁹⁹ The primary safeguard is the trained neutral known as the mediator. Ironically, now courts which inject a mediator into the settlement process may provide a basis for overturning the mediation agreement. Courts may consider mediator misconduct during court-ordered mediation as possible grounds for setting aside mediation agreements.³⁰⁰ In *Vitakis-Valchine v. Valchine*, the wife sought to set aside a mediated settlement agreement reached after seven hours of mediation at which both parties were represented by counsel.³⁰¹ The mediation resulted in a comprehensive twenty-three page agreement.³⁰² The wife alleged, among other things, that coercion and duress on the part of the mediator caused her to enter into the mediation agreement.³⁰³ Correctly construing Florida law at the time of the case, the trial judge found no basis for setting aside the settlement due to alleged duress or coercion by a third party.³⁰⁴ In a thoughtful well-reasoned opinion, Judge Stevenson, writing for the Fourth District Court of Appeal, held a court may set aside an agreement reached through court-ordered mediation if it finds that the agreement was reached as a direct result of substantial mediator misconduct.³⁰⁵

“During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function.”³⁰⁶ “Comprehensive procedures for conduct-

298. Card v. Card, 706 So. 2d 409, 410 (Fla. 1st Dist. Ct. App. 1998).

299. See *infra* Section IV.A; see also FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.300, 10.310, 10.400, 10.410, 10.420.

300. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4th Dist. Ct. App. 2001), *reh'g granted* No. 4D00-2013, 2001 Fla. App. LEXIS 19262 (Fla. 4th Dist. Ct. App. Sept. 25, 2001).

301. *Id.* at 1096.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Valchine*, 793 So. 2d at 1099. The court would determine whether the mediator substantially violated the Florida Rules for Certified and Court-Appointed Mediators, and whether the agreement was reached as a direct result of the mediator misconduct. *Id.*

306. *Id.* at 1090.

ing the mediation session and minimum standards for qualification, training, certification, professional conduct, and discipline of mediators have been set forth by the Florida Supreme Court in the Florida Rules for Certified and Court Appointed Mediators”³⁰⁷ Accordingly, the court of appeal considered it unconscionable to enforce a settlement agreement reached through coercion by a court-appointed mediator, and held “that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures.”³⁰⁸

B. *Extortion, Fraud, and Misrepresentation*

Party wrongdoing also provides a basis for setting aside mediation agreements. In *Cooper v. Austin*, during a lengthy mediation the wife sent her husband a note which read: “If you can’t agree to this, the kids will take what information they have to whomever to have you arrested, etc.”³⁰⁹ Although I would get no money if you were in jail—you wouldn’t also be living freely as if you did nothing wrong.”³¹⁰ Shortly thereafter during the mediation session, the parties settled their property matters.³¹¹ Following the court’s adoption of the mediation agreement, the husband sought relief from the agreement alleging it was procured by extortion.³¹² Although the trial court recognized the extortionate nature of the note, it declined to grant relief determining that the agreement did not result from the wife’s demands.³¹³ The court of appeal reversed and remanded, finding:

In this case, the wife’s “wake-up call”, which demanded the husband either give in to her demands or go to jail, was clearly extortionate and her presentation of the extorted agreement to the court was a fraud on the court making the trial court an instrument of her extortion. Mrs. Cooper should not profit from her actions. Nor should this Court, or any court, ignore them.³¹⁴

307. *Id.* at 1098.

308. *Id.* at 1099.

309. 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000).

310. *Id.*

311. *Id.*

312. *Id.* at 712.

313. *Id.* at 711.

314. *Cooper*, 750 So. 2d at 713.

Neither will courts ignore parties' alleged fraudulent actions.³¹⁵ In *Gostyla v. Gostyla*, the wife alleged that the former husband lied under oath during the final hearing about matters not covered in the mediation agreement, which the court approved and incorporated into its final judgment.³¹⁶ The court of appeal found the trial court erred in denying the wife's motion to set aside the final judgment of dissolution of marriage, and remanded for an evidentiary hearing.³¹⁷ A party who sufficiently alleges intrinsic fraud in a motion to set aside a dissolution of marriage is entitled to a hearing on the merits.³¹⁸

Courts may also vacate mediation agreements and grant hearings for relief from judgment based on parties' misrepresentation.³¹⁹ The court properly vacated the mediation settlement agreement when the evidence demonstrated the former wife made false statements concerning a material fact, knew the representation was false, intended the representation to induce reliance by her former husband, and the former husband was injured by his reliance on her representation.³²⁰ Similarly, a judgment debtor was entitled to a hearing on his motion for relief from judgment when the creditor represented the debtor defaulted on an obligation in their mediation agreement, but misrepresented the true state of affairs to the court.³²¹

C. *Mediation Agreements May Not Violate the Law*

Although parties may decide matters that judges and juries would not, and may be creative in crafting resolutions unique to their needs, there are some decisions they are not authorized to make. "The right to claim federal income tax exemptions under provisions of the parties' marital settlement agreement is one of law, not of fact."³²² Congress delegates to the Internal Revenue Service the authority to interpret tax law and to prescribe rules and regulations for that purpose.³²³ Congress specifically permits affected taxpayers, through the exercise of private contract rights, to claim the depend-

315. *Johnson v. Johnson*, 738 So. 2d 508, 510 (Fla. 1st Dist. Ct. App. 1999) (granting the wife leave to amend her motion to set aside the final judgment of dissolution of marriage to allege fraud with greater particularity or have an evidentiary hearing on the merits).

316. 708 So. 2d 674, 675 (Fla. 2d Dist. Ct. App. 1998).

317. *Id.* at 676.

318. *Id.* at 675.

319. *Still v. Still*, 835 So. 2d 376 (Fla. 3d Dist. Ct. App. 2003).

320. *Id.*

321. *Maresca v. Olivio*, 819 So. 2d 855, 857 (Fla. 5th Dist. Ct. App. 2002).

322. *Hoelzle v. Shapiro*, 736 So. 2d 1207, 1209 (Fla. 1st Dist. Ct. App. 1999).

323. I.R.C. § 7805(a) (2003).

ency exemption.³²⁴ However, federal law prohibits the parties from agreeing on head of household,³²⁵ dependent care credit,³²⁶ or earned income credit.³²⁷ Federal law does allow the parties to designate “that separate maintenance payments are nondeductible by the payor and excludible from the gross income of the payee.”³²⁸ Construing the Internal Revenue Code and Treasury Regulations, the Supreme Court of Florida recently held that state courts may order “that alimony payments . . . [be] excluded from the gross income of the payee and not deducted by the payor.”³²⁹

Bankruptcy matters, also governed by federal law, may not be decided by parties or adjudicated by state judges based on state contract law. Bankruptcy judges are not bound by parties’ or state judges’ characterizations of obligations for purposes of determining dischargeability and exemptions.³³⁰ Nonetheless, bankruptcy judges may consider parties’ unmet obligations in state cases when determining bankruptcy matters.³³¹ A party’s failure to comply with provisions in a mediation agreement incorporated into a final judgment may evince fraud denying the debtor a general discharge in bankruptcy.³³²

State law also limits parties in the decisions they may make regarding their children. Courts are the final authority on child custody and child support, considering the best interests of the child as the overriding factor.³³³ A trial court may set an agreement aside if it is not in the best interests of the children, and must admit evidence relevant to the best interests standard.³³⁴ Therefore, mediation agreement provisions having to do with child support

324. *Hoelzle*, 736 So. 2d at 1209 (citing 26 U.S.C. § 152 (e)(2)(A) (2000)). To claim the dependency exemption, one must qualify. *See* I.R.C. §§ 151, 152 (2003) (listing the basic rules for qualifying for the dependency exemption).

325. *See* I.R.C. § 2(b) (2003) (listing head of household status which is based on principal place of abode).

326. *See* I.R.C. § 21(e)(5) (2003) (listing the rules as to which parent qualifies for taking the dependent care credit).

327. *Hoelzle*, 736 So. 2d at 1209; *see* I.R.C. § 32(c)(3)(A) (2003) (listing the rules as to which parent qualifies for taking the earned income tax credit). There is also a child tax credit. *See* I.R.C. § 24(c)(1)(A) (2003) (listing the rules as to which parent qualifies for taking the child tax credit).

328. *Rykiel v. Rykiel*, 838 So. 2d 508, 509 (Fla. 2003) (quoting *Rykiel v. Rykiel*, 795 So. 2d 90, 93 n.1 (Fla. 5th Dist. Ct. App. 2000) (citing 26 C.F.R. § 1.71-1T, A-8)); *see also* I.R.C. § 71(b)(1)(B) (2003).

329. *Rykiel*, 838 So. 2d at 511–12.

330. *In re Ellertson*, 252 B.R. 831, 833 (S.D. Fla. 2000).

331. *Rykiel*, 838 So. 2d at 511–12.

332. *See Shingledecker v. Shingledecker*, 242 B.R. 80 (Bankr. S.D. Fla. 1999).

333. *See Wayno v. Wayno*, 756 So. 2d 1024 (Fla. 5th Dist. Ct. App. 2000).

334. *See Feliciano v. Feliciano*, 674 So. 2d 937 (Fla. 4th Dist. Ct. App. 1996).

and visitation are not subject to the same enforceability as alimony and marital property provisions.³³⁵ Further, the court has an obligation to consider the availability and propriety of health insurance for the parties' minor children even if the parties did not include such a provision in their mediation agreement.³³⁶ Additionally, courts are not bound by parents' mediation agreements as to reunification with their children.³³⁷ "The ultimate determination on reunification would be for the trial court."³³⁸

Courts must also follow the strict procedural requirements and findings set forth by the Supreme Court of Florida before permitting Human Leukocyte Antigen ("HLA") testing even when the parties have agreed to the testing in their mediation agreement.³³⁹ "Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests."³⁴⁰ Additionally, the child's father has an "unmistakable interest in maintaining the unimpugned relationship with his child."³⁴¹ The courts' obligation to protect children extends to non-domestic relations cases. In *Hernandez v. United Contractors Corp.*, the children's mother settled a wrongful death action on their behalf with the workers' compensation carrier at mediation.³⁴² "No guardian was appointed to represent the children in the workers' compensation proceeding. Absent a determination that the settlement was in the minor children's best interests, the settlement was invalid."³⁴³

D. *Mutual Mistake and Lack of Consideration*

In a recent case of first impression, the Fourth District Court of Appeal addressed the issue of "whether the [mediation] privilege applies where there

335. *Id.*

336. *See* *Butler v. Butler*, 622 So. 2d 73 (Fla. 2d Dist. Ct. App. 1993).

337. *L.F. v. Dep't of Children & Family Servs.*, 837 So. 2d 1098, 1101 (Fla. 4th Dist. Ct. App. 2003).

338. *Id.*

339. *Ownby v. Ownby*, 639 So. 2d 135, 137 (Fla. 5th Dist. Ct. App. 1994). The husband brought a dissolution of marriage action which by order of the court went to mediation. *Id.* at 136. During mediation, the parties entered into an agreement stipulating to HLA blood testing to determine the paternity of the youngest of their six children. *Id.* The husband contends he is the biological father of the six children, and further contends that even if he is not the biological father of the youngest child, he is the legal father because the parties considered him to be the father. *Id.*

340. *Id.* at 137 (quoting *Dep't of Health and Rehab. Servs. v. Privette*, 617 So. 2d 305, 307 (Fla. 1993)).

341. *Ownby*, 639 So. 2d at 137.

342. 766 So. 2d 1249, 1251 (Fla. 3d Dist. Ct. App. 2000).

343. *Id.* at 1252.

has been a mutual mistake in a settlement agreement.”³⁴⁴ Following mediation, the parties settled a suit for specific performance.³⁴⁵ The seller sought relief from the settlement agreement claiming it contained a \$600,000 clerical error.³⁴⁶ Accordingly, the seller appealed the trial court’s decision “that the statutory mediation privilege of confidentiality precluded evidence as to what occurred in mediation, leaving seller without the means to prove that there had been such an error.”³⁴⁷ Acknowledging that confidentiality is necessary to the mediation process, the court of appeal found that once the parties in mediation have signed an agreement, the reasons to retain confidentiality are not as compelling.³⁴⁸ Addressing the constitutional right to go to court to resolve disputes, the court said,

We cannot imagine that the legislature intended that a party to a contract reached after mediation should not have the same access to the courts to correct a \$600,000 mutual mistake, as a party entering into the same contract outside of mediation. We therefore hold that the privilege does not bar evidence as to what occurred at mediation under the facts in this case.³⁴⁹

Within two months of deciding its first case using mutual mistake as a basis for correcting a mediation agreement, the same court decided a second case involving the same issue. In *Feldman v. Kritch*, the parties reached settlement at their second mediation.³⁵⁰ The agreement provided: “State Farm to pay plaintiff \$75,000 by 2:00 p.m. on 7/20/01. Plaintiff to execute full release and file dismissal with prejudice.”³⁵¹ State Farm filed a motion to set aside the settlement agreement claiming that the \$75,000 was to be offset by the \$40,000 State Farm had already paid to Feldman; Feldman filed a motion to enforce the settlement.³⁵² The court of appeal concluded:

344. *D.R. Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So. 2d 971, 973 (Fla 4th Dist. Ct. App. 2002).

345. *Id.*

346. *Id.* at 972.

347. *Id.*

348. Interestingly, section 61.183(3) of the *Florida Statutes*, providing the confidentiality privilege for dissolution of marriage matters, reads: “Each party to a mediation proceeding has a privilege during and after the proceeding to refuse to disclose and to prevent another from disclosing communications made during the proceeding, whether or not the contested issues are successfully resolved.” FLA. STAT. § 61.183(3) (2002). Perhaps mutual mistake will be differently interpreted in dissolution of marriage cases.

349. *D.R. Lakes, Inc.*, 819 So. 2d at 974.

350. 824 So. 2d 274, 276 (Fla. 4th Dist. Ct. App. 2002).

351. *Id.*

352. *Id.*

“[b]ecause State Farm claimed that there was a mutual mistake, the statutory privilege protecting the confidentiality of all oral and written communications, other than the executed settlement agreement, should not apply.”³⁵³ Further, the court determined that the plain language of the agreement was unambiguous and evidence adduced at hearing showed no offset of \$40,000 was discussed during the mediation.³⁵⁴ Therefore, the court found that any mistake was a unilateral mistake made by State Farm.³⁵⁵ “It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain.”³⁵⁶

D.R. Lakes and *Feldman* represent a new line of cases which may significantly and negatively impact the future of mediation. Mere allegation of mutual mistake should not be sufficient to eviscerate the mediation privilege. When applicable, scrivener’s error should be utilized to allow for limited inquiry focusing exclusively on the alleged error.³⁵⁷ If both parties agreed there had been mutual mistake, court determination would likely be unnecessary. When only one party claims the mutual mistake, difficulty of proof exists, along with the potential for abuse.³⁵⁸ Parties to mediation share information with each other to allow for better understanding of their respective positions and goals. They do not share the information with the expectation that an allegation of mutual mistake will eradicate the privilege and allow third parties to subsequently gain access to communications meant to remain between the mediating parties.

If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players

353. *Id.* at 276 (citing FLA. STAT. § 44.102(3) (2000); *D.R. Lakes, Inc.*, 819 So. 2d at 971)).

354. *Feldman*, 824 So. 2d at 277.

355. *Id.*

356. *Id.* (quoting *Barakat v. Broward County Hous. Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th Dist. Ct. App. 2000)).

357. In *Haffa v. Haffa*, discussed *supra* Section II.D., the court directed the mediator to testify, but limited inquiry to the alleged scrivener’s error—the number of shares of stock to be transferred from the husband to the wife. Case No. 93-3422-FL12 (Fla. 11th Cir. Ct. 1994).

358. See generally Deason, *supra* note 17. A party may easily destroy the other parties’ confidentiality privilege by merely alleging mutual mistake if the court then admits evidence and allows testimony that would otherwise be confidential. Bad faith allegations of mutual mistake to get the court to hear such testimony will undermine parties’ faith in the confidentiality of the process.

in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.³⁵⁹

While it is not possible to guarantee that everything will be confidential, it is reasonable and necessary for parties and their attorneys to “know” what will and will not be considered confidential. Increased uncertainty as to the application of the mediation privilege will likely have a chilling effect on communications during the mediation process.

Twelve years prior to the decisions addressing mutual mistake, the Fourth District Court of Appeal used *nudum pactum* (lack of consideration) as a basis for setting aside a mediation agreement.³⁶⁰ In *Leseke v. Nutaro*, the parties attended court-ordered mediation, and reached an agreement which provided: “If Dr. Kramer indicates the Plaintiff has a herniation of C5-6 and C6-7 the Defendants agree to re-evaluate the case. If Dr. Kramer indicates no problems at C5-6 and C6-7 the Plaintiff will accept \$40,000.00.”³⁶¹ The District Court of Appeal found the trial court erred in enforcing the settlement based on Dr. Kramer’s report, as the report did not indicate “no problems” at the specified cervical region.³⁶² Further, it found the agreement to be wholly lacking in consideration, for while Leseke was obligated to a term of the agreement, Nutaro could take whatever evaluative action it chose.³⁶³ The facts of the *Leseke* decision do not support the finding of *nudum pactum*. Having found that the doctor’s report did not indicate what was required to enforce the agreement, the court need not have reached the consideration issue. Here, the parties were involved in litigation, had access to discovery, were represented by counsel, and participated in a mediation session with a neutral, trained mediator. The agreement may have been ill-advised for Leseke, but it was the deal she made with the advice of counsel. Nutaro agreed to reevaluate under specific circumstances. This agreement constituted consideration. If Leseke wanted more than a mere obligation to reevaluate, the agreement needed to be written with greater specificity. Parties and attorneys drafting mediation agreements must remember to dot their “i’s” and cross their “t’s.”³⁶⁴

359. Deason, *supra* note 17, at 36 (quoting *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979)).

360. *Leseke v. Nutaro*, 567 So. 2d 949, 950 (Fla. 4th Dist. Ct. App. 1990).

361. *Id.* at 949–50.

362. *Id.* at 950.

363. *Id.*

364. In *City of Delray Beach v. Keiser*, 699 So. 2d 855 (Fla. 4th Dist. Ct. App. 1997) Judge May wrote, “This appeal highlights the necessity of dotting ‘i’s’ and crossing ‘t’s’ or, in other words, ‘details-details.’” *Id.*

VI. PROCEDURAL AND RELATED MATTERS

A. *Access to the Courts*

A trial court's referral of a case to mediation neither denies parties their constitutional right to be heard in court, nor illegally delegates judicial authority to a nonjudicial entity.³⁶⁵ In *Kurtz v. Kurtz*, a petition for writ of certiorari, the former husband challenged "a post-dissolution order which, by application of local administrative order, defers judicial consideration of his motion for contempt and a visitation schedule, pending family mediation."³⁶⁶ The court of appeal found the order withstood the husband's challenge for it merely deferred ruling on his motion until after family mediation, and "[s]urely [did] not rise to the level of a denial of a constitutional right contemplated by article I, section 21 [of the Florida Constitution]."³⁶⁷

Similarly, the trial court's order did not violate Article V of the Florida Constitution as an illegal delegation of judicial responsibility, for the issues remain for hearing before the trial court should the parties decide not to reach agreement at mediation.³⁶⁸ "Mediation is not a binding court proceeding. If it is unsuccessful, the parties return to the court for further proceedings."³⁶⁹ In determining whether a matter is appropriate for mediation, courts will look to the issues raised by the parties, not the title of the pleading. The former husband's issues involved visitation rights, identified by the *Florida Rules of Civil Procedure* and two applicable administrative orders, as appropriate for referral to mediation.³⁷⁰

365. *Kurtz v. Kurtz*, 538 So. 2d 892, 894 (Fla. 4th Dist. Ct. App. 1989).

366. *Id.* at 893.

367. *Id.* at 894; *see also* FLA. CONST. Art. I, § 21 (2002).

368. *Kurtz*, 538 So. 2d at 894.

369. *Id.* at 894-95.

370. *Kurtz*, 538 So. 2d at 894.

Florida Rule of Civil Procedure 1.740 expressly authorizes the trial court to refer parental responsibility issues to family mediators. Mediation under this rule is intended to expedite matters involving issues of parental responsibility. Rule 2.050 of the Florida Rules of Judicial Administration authorizes local rules and administrative orders on matters of court concern. In accordance with these rules, the chief judge of the Broward Circuit Court entered two administrative orders on family mediation which are involved here.

Id. at 894. *Florida Family Law Rules of Procedure* were adopted in 1995 after the Supreme Court of Florida determined that separate procedural rules were appropriate for family court. *See generally In re Fla. Rules of Family Court Procedure*, 607 So. 2d 396 (Fla. 1992). Rule 12.740 of the *Florida Family Law Rules of Procedure* now governs the referral of family law matters to mediation. It is similar to its predecessor, rule 1.740 of the *Florida Rules of Civil Procedure*, which was deleted in 1995. *Id.*

Alternative dispute resolution processes should be crafted “without creating an unreasonable barrier to the traditional court system.”³⁷¹ In *Jackson v. Jackson*, parties in a dissolution of marriage action entered into a mediation/arbitration agreement.³⁷² “That agreement provided that the controversy between the parties was to be resolved exclusively by means of mediation or arbitration and that the parties waived any right to litigate their claim.”³⁷³ The parties mediated and their matters were ostensibly concluded.³⁷⁴ Nonetheless, eight months later the wife filed a petition for dissolution of marriage.³⁷⁵ The husband did not timely respond to the summons and complaint, relying on the parties’ agreement and the drafting attorneys’ statements that the agreement precluded them from pursuing civil action.³⁷⁶ Additionally, the husband stated that the wife advised him she intended to withdraw the lawsuit and proceed with arbitration.³⁷⁷ The court of appeal found excusable neglect on the husband’s part, reversed the trial court’s denial of the motion to set aside the default, and remanded to the trial court for proceedings consistent with their opinion.³⁷⁸

Mediation parties must be given appropriate notice and an opportunity to be heard prior to court approval of mediation agreements. In *Vance v. Thomas*, an incarcerated individual (Vance) participated in mediation by phone.³⁷⁹ He denied agreeing to a settlement and no settlement papers were executed.³⁸⁰ Although there was no finding by the judge or representation by Vance’s counsel that Vance agreed to the settlement, the only hearing notice sent to him regarded payment of fees and costs to his attorney.³⁸¹ The court of appeal found the notice of hearing for attorney’s fees inadequate notice for the trial court to have conducted a hearing to enforce the alleged settlement agreement.³⁸²

Similarly, an insurer was denied due process by not having an opportunity to be heard prior to the court approving a mediation settlement agree-

371. Committee Notes 1994 Amendment, FLA. R. CIV. P. 1.710. (“The Supreme Court Committee on Mediation and Arbitration Rules encourages crafting a combination of dispute resolution processes without creating an unreasonable barrier to the traditional court system.”)

372. 542 So. 2d 481 (Fla. 2d Dist. Ct. App. 1989).

373. *Id.*

374. *Id.*

375. *Id.* at 482.

376. *Id.*

377. *Jackson*, 542 So. 2d at 482.

378. *Id.* at 482–83.

379. *Vance v. Thomas*, 829 So. 2d 319, 320 (Fla. 5th Dist. Ct. App. 2002).

380. *Id.*

381. *Id.*

382. *Id.* at 320.

ment for the benefit of an insured.³⁸³ A health insurance company sought to intervene in a products liability lawsuit, which had been settled by mediation before the court approved the settlement and dismissed the case.³⁸⁴ The district court of appeal vacated the denial of the motion to intervene and the order approving the settlement, finding: "Humana has demonstrated a right to intervene and to at least be heard before distribution of the judgment or settlement proceeds."³⁸⁵ Perhaps Humana's intervention will not change the outcome, but at least Humana will have had the opportunity to be heard"³⁸⁶ However, an insurance company which was present at mediation and had actual notice of the settlement was not entitled to summary judgment in its favor based on insured's failure to provide written notice of and obtain consent to the proposed settlement.³⁸⁷ Genuine issues of material fact as to whether State Farm waived the settlement provisions and was prejudiced by the failure to obtain its consent precluded summary judgment.³⁸⁸

Appellate courts have been kind to petitioners who request the wrong relief. "[I]f a party seeks an improper remedy 'the cause shall be treated as if the proper remedy had been sought.'"³⁸⁹ In *Croteau v. Operator Service Company of South Florida*, petitioners sought a writ of common law certiorari from the trial court's order denying their motion to enforce a mediated agreement.³⁹⁰ The court of appeal concluded that certiorari was not the proper remedy.³⁹¹ However, determining that the order denying the motion to enforce the settlement agreement was a partial final judgment, the court found it had jurisdiction to review the judgment.³⁹²

Parties seeking to appeal enforcement of mediation agreements must provide the appellate court with either a trial transcript or proper substitute to allow the court to evaluate allegations that the trial court erred.³⁹³ In *Bartel v. J & A Balboa Enterprises, Inc.*, Bartel appealed the trial court's order to

383. *Humana Health Plans v. Lawton*, 675 So. 2d 1382, 1385 (Fla. 5th Dist. Ct. App. 1996).

384. *Id.* at 1383.

385. *Id.* at 1385.

386. *Id.*

387. *Gray v. State Farm Mut. Auto. Ins. Co.*, 734 So. 2d 1102, 1103 (Fla. 2d Dist. Ct. App. 1999).

388. *Id.*

389. *Croteau v. Operator Serv. Co. of S. Fla.*, 721 So. 2d 386, 387 (Fla. 4th Dist. Ct. App. 1998) (citing FLA. R. APP. P. 9.040(c)).

390. *Id.*

391. *Id.*

392. *Id.*

393. *Bartel v. J & A Balboa Enters., Inc.*, 703 So. 2d 1140, 1141 (Fla. 5th Dist. Ct. App. 1998).

enforce a mediation settlement agreement.³⁹⁴ The court of appeal elected to treat the appeal as a writ of certiorari, and denied the writ.³⁹⁵ Bartel then filed an appeal alleging that the attorney who represented her in the mediation that led to the settlement agreement was guilty of misconduct and misrepresentation.³⁹⁶ Since Bartel raised factual allegations, and failed to provide the court with a transcript or an appropriate substitute, she was unable to establish error and her appeal necessarily failed.³⁹⁷

B. *Use of and Access to Alternative Dispute Resolution*

Parties must mediate when ordered by the court to do so,³⁹⁸ and may also mediate on their own initiative prior to, during, or subsequent to litigation.³⁹⁹ When parties reach a mediation agreement, one may not later claim it was void *ab initio* because the agreement was entered into while litigation was pending in a court that lacked subject matter jurisdiction to enforce terms in the agreement.⁴⁰⁰ In *Patel v. Ashco Enterprises, Inc.*, the parties entered into a mediation agreement while the case was pending in county court.⁴⁰¹ The agreement provided that, “if Patel breached the agreement, the case would be transferred to the circuit court and a judgment would be entered against Patel”⁴⁰² Following Patel’s failure to make the first payment, the case was transferred to circuit court, and the court enforced the agreement.⁴⁰³ The court of appeal found that the trial court properly enforced the mediation agreement even though it was executed while litigation was pending in county court and the county court’s jurisdiction was subject to challenge.⁴⁰⁴ “While a settlement agreement may be the basis upon which a judgment may be entered, it is also a contract between the parties, the en-

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. FLA. R. CIV. P. 1.700(a) (2003). A judge “may enter an order referring all or any part of a contested civil matter to mediation” *Id.* A party may move to dispense with or defer mediation. See FLA. R. CIV. P. 1.700(b) (c). For matters excluded from mediation, see FLA. R. CIV. P. 1.710(b).

399. Parties may file a written stipulation to mediate, FLA. R. CIV. P. 1.700(a), or one party may request the court to refer the case to mediation. FLA. STAT. § 44.102(2)(a) (2002). Parties may also mediate without court orders.

400. See *Patel v. Ashco Enters., Inc.*, 711 So. 2d 239, 240 (Fla. 5th Dist. Ct. App. 1998).

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 241.

forceability of which is governed by the laws of contract.”⁴⁰⁵ Parties seeking to enforce mediation agreements may bring independent enforcement actions.⁴⁰⁶

The laws of contract also govern the parties’ obligation to submit to arbitration, and may include the condition precedent that the parties first mediate.⁴⁰⁷ In *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, the parties’ agreement read: “In the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph.”⁴⁰⁸ The agreement also provided: “[I]n the event that [a] dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party.”⁴⁰⁹ Under the plain language of the agreement, a party had to request mediation and provide notice of the request to the other party.⁴¹⁰ If the disputes were not resolved in mediation, a party must then provide notice of intent to pursue arbitration to trigger the arbitration clause.⁴¹¹

Mediation may be required to move a case forward. It is not meant as a dilatory tactic. In *Paz v. Fidelity National Ins. Co.*, Paz appealed a circuit court’s decision entering summary judgment in favor of Fidelity.⁴¹² Paz had submitted medical bills for injuries sustained in an automobile accident to Fidelity, her insurer for personal injury protection benefits, demanding payment pursuant to statute within thirty days.⁴¹³ Following Fidelity’s decision to question the submitted charges and to demand arbitration or mediation, Paz filed a bad faith action alleging her insurer breached its duty to act fairly and honestly, and sought to delay or avoid payment by demanding mediation and arbitration although neither was available.⁴¹⁴ The court of appeal found the trial court erred as a matter of law, for Fidelity did not pay the damages due within the required time frame.⁴¹⁵ “Additionally, summary judgment was improper where review of the record shows that there are genuine issues of [material] fact remaining as to the allegations that Fidelity routinely de-

405. *Patel*, 711 So. 2d at 240.

406. *T.K.M. v. E.H.*, 844 So. 2d 669, 670 (Fla. 3d Dist. Ct. App. 2003).

407. *Kemiron Atlantic, Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287, 1290–91 (11th Cir. 2002).

408. *Id.*

409. *Id.*

410. *Id.* at 1291

411. *Id.*

412. 712 So. 2d 807 (Fla. 3d Dist. Ct. App. 1998).

413. *Id.* at 807–08.

414. *Id.*

415. *Id.* at 809.

mands mediation and arbitration, as a means of delaying or avoiding payment.”⁴¹⁶

As some parties may seek to misuse mediation to delay legal obligations, some non-parties seek access to mediation proceedings to gain information about governmental entities. In a case involving Lee County, the City of Fort Myers, and the City of Cape Coral, a reporter “filed a motion for limited intervention and to compel the mediation hearings to be open to the public and the media.”⁴¹⁷ The trial court granted the motion to intervene, but denied the motion to open the mediation proceedings.⁴¹⁸ Further, the judge amended the mediation order to allow the parties to send representatives to mediation who did not have full authority to settle.⁴¹⁹ The court of appeal did not decide the significant issue of whether the “Sunshine Law”⁴²⁰ applies to mediation proceedings when public bodies are the parties.⁴²¹ The court held “that the narrow scope of the mediation proceedings in this case does not give rise to a substantial delegation affecting the decision-making function of any board, commission, agency, or authority sufficient to require that this mediation proceeding be open to the public.”⁴²²

C. *Obligations of Judges, Attorneys, and Paralegals*

Mediators should do the mediating, and judges the judging.⁴²³ The Fifth District Court of Appeal offered this caveat in a case involving the former baseball player Ted Williams.⁴²⁴ During a case management conference, the judge offered to mediate the case, “provided . . . all of the parties and their attorneys agreed that they would not use the trial judge’s attempt to mediate the case as basis for disqualification.”⁴²⁵ During the mediation, the judge said to the defendant, “there’ll always be people like [you] around, but let’s face it, there’s only one Ted Williams.”⁴²⁶ The defendant believed that the

416. *Id.*

417. *News-Press Publ’g Co. v. Lee County*, 570 So. 2d 1325, 1326 (Fla. 2d Dist. Ct. App. 1990).

418. *Id.*

419. *Id.*

420. FLA. STAT. § 286.011 (2002).

421. *News-Press Publ’g Co.*, 570 So. 2d. at 1327.

422. *Id.*

423. *Evans v. State*, 603 So. 2d 15, 17 (Fla. 5th Dist. Ct. App. 1992).

424. *Id.* at 16.

425. *Id.*

426. *Id.* Additionally, when the defendant, Antonucci, presented his settlement figure, the judge advised him to “get real.” *Id.* at 16 n.3.

judge was prejudiced against him.⁴²⁷ Consequently, the defendant's attorney filed a motion to disqualify the judge based on statements made by the judge during mediation.⁴²⁸ Shortly thereafter, the judge adjudicated him guilty of criminal contempt, finding the attorney lied when he agreed not to move to disqualify the judge for mediating the case.⁴²⁹ Reversing the attorney's conviction of direct criminal contempt, the court of appeal directed that a judgment of not guilty be entered.⁴³⁰ Additionally, the court advised:

If a judge decides to mediate a case with the consent of all concerned parties, the judge should act only as a settlement judge for another judge who will hear and try the matter in the event [the] mediation fails, such as in the situation where a retired judge mediates a case but does not try the case.⁴³¹

Knowing a "mediator will not be deciding the case, . . . the parties are free to discuss . . . the ramifications of settling a particular dispute as opposed to litigating it."⁴³² "In contrast, the judge's role is to decide the controversy fairly and impartially, consistent with the established rule of law. In this regard, to paraphrase Socrates: Four things belong to a judge; to hear courteously; to consider soberly; to decide impartially; and to answer wisely."⁴³³

Mediation does not displace judges' statutory obligation to rule on claims.⁴³⁴ In a dissolution of marriage action involving equitable distribution of marital assets and debts, as well as attorney's fees, the judge dissolved the marriage without ruling on the parties' claims.⁴³⁵ The court order, in relevant part read: "The Husband/Petitioner and Wife/Respondent shall divide all of their marital assets and liabilities equally. If the parties are unable to reach agreement on their own as to a fair division then this matter shall be submitted to mediation which shall be binding."⁴³⁶ The court of appeal found that the judge failed to carry out the statutory duties imposed on judges hearing

427. *Evans*, 603 So. 2d at 16 n.3.

428. *Id.* at 17.

429. *Id.* at 16.

430. *Id.* at 18. The court found the evidence did not support the judge's finding that appellant had lied. *Id.* "The agreement not to seek recusal was limited to the trial judge acting as mediator and not to the nature of any comments that the trial judge would make during the mediation proceedings." *Evans*, 603 So. 2d at 17.

431. *Id.*, 603 So. 2d at 17-18.

432. *Id.* at 17.

433. *Id.*

434. *Chabotte v. Chabotte*, 707 So. 2d 923, 924 (Fla. 4th Dist. Ct. App. 1998).

435. *Id.*

436. *Id.*

dissolution of marriage cases.⁴³⁷ The court was required to distribute both marital and non-marital assets.⁴³⁸ Furthermore, mediation allows the parties self-determination.⁴³⁹ If they choose not to reach agreement, there is no mediation agreement to be binding.⁴⁴⁰

The Code of Judicial Conduct limits the mediation functions judges may ethically perform. The Judicial Ethics Advisory Committee, charged with rendering advisory opinions interpreting the Code of Judicial Conduct as applied to specific circumstances facing judges, stated that a judge may not privately mediate the dissolution of his friends' marriage.⁴⁴¹ "Unless there is an expressed law or court rule authorizing the judge's service as a private mediator, a judge may not ethically mediate the dissolution of his/her friends' marriage."⁴⁴²

Attorneys must also know their obligations to the court and the parties regarding mediation. Foremost, an attorney should be aware that merely filing a motion for mediation will not defeat case dismissal for lack of prosecution. "[A] motion for mediation conference, standing alone and without any follow-up activity during the subsequent six-month period, is not record activity implemented to advance the case forward to a conclusion on the merits."⁴⁴³ To avoid having a case dismissed for failure to prosecute, an attorney must proceed with the mediation following a notice, and if a motion to dismiss hearing is set, must show good cause why the case should remain pending.⁴⁴⁴

With virtually every civil case going to mediation prior to trial, mediators and attorneys are increasingly facing conflict of interest issues. Attorney mediators and their law partners confront ethical directives of both professions when making difficult decisions regarding disqualification. A recent case addresses "the standard to be applied in determining disqualification of a law firm when a member of the firm previously acted as a mediator in the pending dissolution proceedings."⁴⁴⁵ In *Matluck v. Matluck*, the former wife filed a petition of certiorari to quash the trial court's order denying her mo-

437. *Id.*

438. *Id.*

439. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.230.

440. "Decision-Making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination." FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310(a).

441. Fla. Judicial Ethics Advisory Comm., Op. 2002-01.

442. *Id.*

443. *Heinz v. Watson*, 615 So. 2d 750, 753 (Fla. 5th Dist. Ct. App. 1993).

444. *Id.*

445. *Matluck v. Matluck*, 825 So. 2d 1071, 1072 (Fla. 4th Dist. Ct. App. 2002).

tion to disqualify her former husband's attorney.⁴⁴⁶ The parties had mediated during post-dissolution proceedings, and the mediator had received highly confidential information from the former wife and her counsel during the mediation.⁴⁴⁷ The mediator, subsequently, formed a law firm with the attorney who was representing the former husband on the same post-dissolution matters.⁴⁴⁸

The former wife urged the court of appeal "to extend Rule 4-1.10(b) to the law firm of a mediator who received confidential information during the mediation process."⁴⁴⁹ The court agreed: "Considering the broad scope of information protected by Rule 4-1.10(b), the values inherent in preserving the confidences of parties in mediation, and maintaining the integrity of the mediation process itself, we can see no reason not to apply this rule to a mediator and the mediator's law firm."⁴⁵⁰ Other courts and the Florida Mediator Qualifications Panel are in accord.⁴⁵¹ "[I]t is inappropriate for the mediator to represent either party in any dissolution proceeding or in any matter arising out of the subject mediation."⁴⁵² Additionally, a law firm will be subject to disqualification from representing a client when following unsuccessful mediation, the firm hired the mediator.⁴⁵³

However, attorneys who seek to withdraw as counsel of record due to conflicts of interest, will not necessarily gain court approval to do so. In *Billings, Cunningham, Morgan & Boatwright, P.A. v. Isom*, the law firm moved to withdraw from representing a client who sought to set aside the agreement reached during mediation, alleging mis-advice by the firm.⁴⁵⁴ The client, Isom, asserted, "that a former associate of the law firm had advised him to sign the settlement and release, but assured Isom the documents were

446. *Id.*

447. *Id.* at 1073.

448. *Id.*

449. *Id.* at 1073.

Rule 4-1.10(b) of the Florida Rules of Professional Conduct provides: When a lawyer becomes associated with a firm, [the] firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm of which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

Matluck, 825 So. 2d at 1072.

450. *Id.* at 1073.

451. *See id.*

452. *Id.* (quoting Mediator Qualifications Advisory Panel, Op. 94-003). The Mediator Qualifications Advisory Panel (MQAP) has been renamed the Mediator Ethics Advisory Committee (MEAC).

453. *Id.* at 1073-74.

454. 701 So. 2d 1271, 1272 (Fla. 5th Dist. Ct. App. 1997).

not final and would not bar further settlement discussions.”⁴⁵⁵ The trial court denied the firm’s motion to withdraw, considering the client’s allegation of mis-advice, duration of representation, and the client’s inability to obtain new counsel.⁴⁵⁶ “[A] trial court has the authority to order continued representation, even when potential ethical conflicts are presented.⁴⁵⁷ Its decision to deny a motion to withdraw will not be disturbed, absent a clear abuse of discretion.”⁴⁵⁸

A trial court also has the authority to award attorney’s fees to enforce a mediation agreement reached in a court-ordered mediation.⁴⁵⁹ “Rule 1.730(c) [of the *Florida Rules of Civil Procedure*] provides that a court may impose sanctions, including attorney’s fees, against a party who fails to perform under a settlement agreement reached in court-ordered mediation.”⁴⁶⁰ Significantly, even though a written mediation order is customary, Rule 1.730 does not require a written order.⁴⁶¹ “A court’s oral order is valid and binds the parties even though a written order has not been entered.”⁴⁶² The trial court has discretion to determine whether an attorney should be awarded fees under this rule.⁴⁶³

Non-attorneys attending mediation sessions may not hold themselves out as attorneys or engage in the unauthorized practice of law.⁴⁶⁴ In *Florida Bar v. Neiman*, the Florida Bar alleged that Neiman had “repeatedly engaged in the unauthorized practice of law over a period of approximately seven years.”⁴⁶⁵ The referee’s detailed findings included that Neiman actively participated in presenting clients’ cases at mediation sessions. “The referee further found that Neiman engaged in the unlicensed practice of law based upon the referee’s finding that no attorney had any meaningful role in the

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Lazy Flamingo, USA, Inc. v. Greenfield*, 834 So. 2d 413, 414 (Fla. 2d Dist. Ct. App. 2003). The Court of Appeal upheld the trial court’s decision rejecting appellant’s claim for attorney’s fees based on the original contract that gave rise to the underlying litigation and section 57.105 of the 2001 *Florida Statutes*. *Id.* at 414. It reversed the trial court’s decision not to award fees based on rule 1.730(c) of the *Florida Rules of Civil Procedure* and remanded the case to allow consideration of its ruling. *Id.* at 415.

460. *Id.* at 414.

461. *Id.* at 415.

462. *Greenfield*, 834 So. 2d at 415 (citing *Knott v. Knott*, 395 So. 2d 1196, 1198 (Fla. 3d Dist. Ct. App. 1981)).

463. *Id.* (citing *Trowbridge v. Trowbridge*, 674 So. 2d 928, 932 (Fla. 4th Dist. Ct. App. 1996)).

464. *See Florida Bar v. Neiman*, 816 So. 2d 587 (Fla. 2002).

465. *Id.* at 588.

development or settlement of several of the cases.”⁴⁶⁶ Having determined that Neiman engaged in the unlicensed practice of law, the referee recommended, and the court approved, that Neiman be enjoined from numerous activities, including speaking on behalf of third parties at mediation even with an attorney present, and appearing on behalf of third parties at mediation without the attorney present for whom he was employed.⁴⁶⁷

VII. CONCLUSION

Mediation has come of age and taken a place in Florida’s legal system. Our extensive body of case law over a relatively brief period of time highlights mediation’s significant role in the resolution of disputes. Florida’s comprehensive mediation law necessarily includes ethical rules for mediators, rules of procedure, and statutory law. As the law further develops, mediators and lawyers will need to stay abreast of developments in the field. This article is offered as a beginning in the discussion of mediation case law. The Dispute Resolution Center in Tallahassee remains an excellent source of continuing information and education. The Center holds annual conferences, and publishes the Resolution Report to keep interested individuals apprized of developments in the mediation field.⁴⁶⁸

Mediation’s incorporation into the legal system should not signal its assimilation. Mediation has more to offer than the mere resolution of disputes. Mediating parties are in the unique position of making their own decisions and structuring their own agreement with the assistance of a trained mediator. They rely on the confidentiality of the process to allow them to share the information they need to understand each other and identify and evaluate settlement options. They are also in the unique position of holding a privilege to maintain the confidentiality of the process. The extent of the confidentiality privileges should be clarified, and the courts should continue their role in maintaining the shield of confidentiality. As we rightfully utilize mediation as a dispute resolution process, we must continue to recognize its uniqueness and seek to preserve its process. After all, it has just come of age. With a nourishing environment and some benign neglect, it may yet flourish and increasingly serve not only the legal system, but society at large.

466. *Id.*

467. *Id.* at 594, 599.

468. Case and Comment, a regular feature in The Resolution Report written by Perry Itkin, provides information about new significant mediation cases. The Resolution Report is the newsletter published by the Dispute Resolution Center, a joint program of the Supreme Court of Florida and the Florida State University College of Law. Perry Itkin, *The Resolution report*, available at http://www.tfapm.org/Dreldrc_newsletter.shtml (last visited Oct. 11, 2003).